SUPREME COURT, U. S.
NOV 11 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

NO. 74-5691

WILLIAM S. ELLIS, JR.,

Petitioner,

v.

HAWAII,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

and

APPENDICES A TO E

WILLIAM S. ELLIS, JR.
12 N. King Street, Rm. 17
Honolulu, Hawaii 96817
Petitioner, pro se

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONS AND STATUTES INVOLVED	6
STATEMENT OF THE CASE	
A. Injunction Proceeding is an Offshoot of a Mortgage Foreclosure Suit	6
B. The Mortgagees Prosecuted Injunction Proceeding to Prevent Petitioner from Further Representing Himself in Court as Liquidating Trustee	13
C. Upon Removal of Injunction Proceeding, Federal District Court Permitted Petitioner to Appear Without Counsel and Held Scope of State Injunction to Be Confined to State Courts	19
D. Upon Removal of Foreclosure Suit, Federal District Court and Court of Appeals Permitted Petitioner to Appear Without Counsel	23

E. Petitioner Has Been Fined $250 by Hawaii Supreme Court for Appearing Without Counsel Before Federal Courts 25

REASONS FOR GRANTING THE WRIT

A. The Fundamental Federal Question Involved Has Not Been Heretofore Decided by This Court 31

B. The Fundamental Federal Question Involved Has Been Decided Contrary to the Rationale of Federal Courts 33

C. Only This Court Has the Power to Accord Petitioner Appellate Relief 37

CONCLUSION 37

CITATIONS

Cases:

Adams v. United States, 317 U.S. 269 ..... 36, 37

Nelson et al. v. Smith et al., 154 P.2d 634 32

Osborn v. United States, 22 U.S. (9 Wheat.) 738 ..... 33, 34

State v. Fletcher Trust Co., 5 N.E. 2d 538 31

Willheim v. Murchison, 206 F. Supp. 733 ..... 28, 34, 35

United States Constitution:

Sixth Amendment 36

Fourteenth Amendment 4, 5, 6, 12, 28, 36

Statutes:

28 U.S.C.A.

Sec. 1257(3) 2

Sec. 1447(c) 23

Sec. 1654 ..... 28, 32, 33, 34, 35, 37

Hawaii Revised Statutes

Sec. 416-124 7

Revised Laws of Hawaii 1955

Sec. 230-55 8

Hawaii Penal Code
(Act 9, S.L.H. 1972)

Sec. 1 31

Sec. 114 31

Sec. 115 31

Sec. 206(1) 31

Sec. 218 31

Sec. 220 31

Rule:

Rule 11, F.R.C.P. 25

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

NO.

WILLIAM S. ELLIS, JR.,

Petitioner,

v.

HAWAII,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

Petitioner prays that a writ of certiorari issue to review the Judgment of Contempt entered by the Supreme Court of the State of Hawaii on June 13, 1974, in this case (captioned "In the Matter of the Unauthorized Practice of Law of WILLIAM S. ELLIS, JR., trustee for the creditors and shareholders of Kula Development Corporation").

OPINIONS BELOW

The judgment sought to be reviewed is for

contempt of a prior Final Judgment entered in this case by the Hawaii Supreme Court on September 23, 1971, based upon an opinion rendered on June 25, 1971 (53 Haw. 23). The first opinion and judgment are reproduced as Appendices A and B to this petition. The judgment sought to be reviewed is based upon an opinion entered in this case on May 3, 1974 (55 Haw. --), reproduced as Appendix C to this petition.

JURISDICTION

The Judgment of Contempt sought to be reviewed (Appendix D to this petition) was entered in this case by the Hawaii Supreme Court on June 13, 1974, at 11:40 o'clock A. M. The Petitioner, having been denied status to file applications for relief or to argue the law in his proper person before the court, filed no petition for rehearing.

On August 24, 1974, the Honorable W. O. Douglas, Associate Justice of this Court, ordered an extension of time to and including November 10, 1974, for filing this petition.

Petitioner believes that Sec. 1257(3), 28

U.S.C.A., as it relates to rights, privileges, and immunities set up and claimed under the laws and Constitution of the United States, confers upon this Honorable Court jurisdiction to review the judgment in question by writ of certiorari.

QUESTIONS PRESENTED

This case fundamentally involves the question of whether or not a natural person may plead and conduct his own case personally in the courts of the United States. While all other questions might be considered subsidiary thereto, Petitioner sets forth all federal questions arising in the case, out of an abundance of caution.

1. May any natural person plead and conduct his own case personally before the courts of the United States?

2. Does a state court of last resort have jurisdiction to characterize such appearance, permitted by the courts of the United States, as the unauthorized practice of law?

3. Having characterized such permitted

appearance as the unauthorized practice of law, does a state court have jurisdiction under the circumstances to penalize such natural person for criminal contempt of its injunction against "engaging further in the unauthorized practice of law"?

4. Where a natural person "is permanently enjoined from engaging further in the unauthorized practice of law" by a state court, and nothing more, is the injunction so uncertain as to violate the 14th Amendment to the U.S. Constitution?

5. Where a natural person removes to a federal district court an original proceeding in a state court of last resort to deprive him of his right to appear without counsel, and in such removed action the federal court in an order of remand construes such proceeding as within the state court's inherent power to regulate the practice of law before the state courts, is such person thereafter immune from relitigation and effectual reversal by the state court of the federal court's decision?

6. Where a natural person is permitted to appear without counsel before the federal district court, federal appellate court, and this Honorable Court, is such person thereafter immune from relitigation and effectual reversal by a state court of the federal courts' tacit determination that such appearance is not the unauthorized practice of law?

7. In exercising its inherent power to regulate the practice of law, is a state court of last resort in a common-law jurisdiction limited by the 14th Amendment to the U.S. Constitution to its original jurisdiction conferred by the state constitution and statutes; to established modes of procedure in accordance with the common law, applicable statutes, and rules of court; and to Anglo-American common-law acceptation of the meaning of "own cause" and "practice of law"?

8. Does a natural person appearing in his own cause as party plaintiff, defendant, or accused in a state court have an inherent and inalienable right to represent himself which is

protected by the 14th Amendment to the U.S. Constitution?

9. When a clear and unambiguous state statute vests a person with title to all assets and property belonging to a dissolved corporation--real, personal, and mixed--and confers upon such person the power to sue in his own name, does a state court transcend its authority conferred by law, encroach upon the province of the legislature, and thereby transgress the due process clause of the 14th Amendment to the U.S. Constitution by the arbitrary "construction" of said statute to divest such person of title and his power to sue as real party in interest?

CONSTITUTIONS AND STATUTES INVOLVED

Constitutional provisions and statutes involved are set forth in Appendix E to this petition.

STATEMENT OF THE CASE

A. Injunction Proceeding Is an Offshoot of a Mortgage Foreclosure Suit.

Petitioner has been and is statutory successor to dissolved Hawaii corporations, one of

which is Kula Development Corporation. The pertinent statute (Sec. 416-124, H.R.S.) vests Petitioner with title to all assets and property of said corporation--real, personal, and mixed--and confers upon him the power to sue.

As a statutory successor, Petitioner appeared pro se as party plaintiff and defendant in 13 civil actions in the circuit courts of the State of Hawaii and as appellant and appellee in four appeals in the Hawaii Supreme Court. In those actions and appeals pending at the time of corporate dissolution, Petitioner was duly substituted as corporate successor by order of the respective courts.

In one circuit court case, the capacity of Petitioner to sue as plaintiff pro se was challenged and expressly determined in his favor on a preliminary hearing.

Civil No. 26954, First Circuit Court, State of Hawaii (hereinafter called the "state circuit court"), is a mortgage foreclosure suit in which Kula Development Corporation was the mortgagor

defendant until its dissolution. The suit was commenced on January 7, 1969, by George and Macel Powers (hereinafter called "the mortgagees"), then represented by Anthony B. Craven, Esq. Defendant Kula Development Corporation was served January 9, 1969, and was involuntarily dissolved the same date.

As one of four successor mortgagors, Petitioner filed a copy of the dissolution decree in the foreclosure case on January 27, 1969, with Suggestion of Dissolution and Motion for Summons Pursuant to Sec. 230-55, R.L.H. 1955, to compel the mortgagees to proceed by substituting the statutory successors in the action which had abated as a matter of law upon corporate dissolution.

Craven represented the mortgagees to resist the motion at a hearing on February 4, 1969, The transcript reveals:

> "THE COURT: Note the appearance of Mr. Ellis on behalf of Kula Development Corporation.

"You're appearing as Co-trustee, correct?"

"MR. ELLIS: Specially appearing as Trustee, your Honor."

. . .

"THE COURT: . . . You're not appearing as an attorney now, Mr. Ellis."

"MR. ELLIS: No, I cannot."

"THE COURT: You're appearing as one of the co-trustees. You're not permitted to practice law in this State."

"MR. ELLIS: I understand that."

Petitioner and co-trustees, they represented by counsel, filed a cautionary answer to the complaint on February 6, 1969. James S. Campbell, Esq., who was substituted as counsel for the mortgagees in the foreclosure suit on March 4, 1969, made no objection to Petitioner's pro se appearance. On November 6, 1969, Petitioner was duly appointed sole statutory successor to Kula Development Corporation.

On January 2, 1970, the mortgagees filed a statement of readiness in the foreclosure case, without serving a copy on Petitioner. On March

16, 1970, Petitioner moved pro se to strike the action from the ready trial calendar. The motion was granted by an order entered March 20, 1970.

On March 23, 1970, the mortgagees moved to substitute Petitioner in the foreclosure case for the original defendant. The motion was unopposed, and Petitioner was ordered substituted on April 7, 1970. On April 30, 1970, Petitioner withdrew the cautionary answer to the complaint filed February 9, 1969, which contains defenses then moot.

On May 19, 1970, the mortgagees entered into a stipulation with Petitioner, signing pro se, approved by the court, which extended time to answer the complaint. The answer filed June 2, 1970, includes counterclaims against the mortgagees.

Without replying and placing the counterclaims in issue, the mortgagees moved on August

19, 1970, to sever the complaint and counterclaims from cross-claims against other defendants, for separate trial.

On August 31, 1970, Petitioner obtained an entry of default against the mortgagees on the counterclaims. Order for separate trials was entered September 9, 1970, and the state circuit court gratuitously set trial on the complaint and defaulted counterclaims for October 5, 1970.

On September 19, 1970, Petitioner filed a motion to reconsider the order for separate trials and an oral decision to set aside default on the counterclaims, objecting to denial of due process of law.

Default was set aside on September 28, 1970, prior to hearing objections by Petitioner. Motion to reconsider was denied by an order entered October 2, 1970.

The mortgagees replied to the counterclaims on September 28, 1970, serving Petitioner by mail. On October 2, 1970, Petitioner delivered interrogatories to the mortgagees' coun-

sel respecting issues raised by the reply on September 28, 1970. The interrogatories have not been answered. Also on October 2, 1970, Petitioner noticed appeal to the Hawaii Supreme Court from the collateral orders for separate trial and denial of rehearing or amendment.

At trial on October 5, 1970, Petitioner presented to the presiding judge a motion to defer proceedings for lack of jurisdiction pending appeal. The motion was orally denied.

Upon refusal of the court to entertain preliminary oral motions thereafter, Petitioner declared his election to stand on rights protected by the 14th Amendment to the U.S. Constitution and was excused by the court. The mortgagees proceeded with trial ex parte. A decree of foreclosure was entered by the court on October 30, 1970. No copy has been served upon Petitioner.

B. The Mortgagees Prosecuted Injunction Proceeding to Prevent Petitioner from Further Representing Himself in Court as Liquidating Trustee.

On October 8, 1970, after more than 20 months of acquiescence to Petitioner's pro se appearance as successor mortgagor in the foreclosure action, Civil No. 26954, the mortgagees commenced a sui generis injunction proceeding in the Hawaii Supreme Court (No. 5044) by filing a Motion for Permanent Injunction to Enjoin the Unauthorized Practice of Law by William S. Ellis, Jr., as Trustee of Kula Development Corporation. On October 13, 1970, the Hawaii Supreme Court issued the following Order to Show Cause:

> "YOU ARE HEREBY ORDERED to appear before the Supreme Court of the State of Hawaii in the Judiciary Building, Honolulu, Hawaii, at the hour of 9 A.M., on Tuesday, the 10th day of November, 1970, then and there to show cause, if any you have, why a permanent injunction should not issue forever enjoining you as trustee for the creditors and shareholders of Kula Development Corporation from practicing

law without a license within the Courts of the State of Hawaii." (Emphasis added.)

Petitioner demurred to the Order to Show Cause in No. 5044 with Motion to Quash Return of Service, Vacate Order to Show Cause, and Dismiss Proceeding, appearing pro se. He thus raised objections to the Hawaii Supreme Court's lack of original jurisdiction in equity, insufficiency of process, lack of in personam jurisdiction of Petitioner, lack of the mortgagees' capacity to sue, lack of Respondent CAMPBELL's authority to prosecute the proceeding, failure to duly commence a judicial proceeding, and failure to state a claim for relief.

The objections were brushed aside as mere technicalities, the Hawaii Supreme Court declaring its inherent plenary power in the premises.

Petitioner was allowed to respond to the merits of the Order to Show Cause by November 19, 1970. He replied that his pro se appearance is not the practice of law. His verified response attested that he would not continue to appear pro

se if the court should decide that such appearance constitutes the practice of law. Therefore, an injunctive order was unnecessary.

In its Order for Continuance entered November 25, 1970, the Hawaii Supreme Court allowed additional memoranda to be filed for further argument on January 12, 1971.

On June 25, 1971, the Hawaii Supreme Court entered its opinion in No. 5044 (Appendix A), its decision turning on points of law neither briefed nor argued. In Parts I and II, the court divested Petitioner of title to property and power to sue. Legislative Part III promulgates a gratuitous unique exception rule which would authorize Petitioner to "practice law" for the real parties in interest -- stockholders and creditors -- should economic conditions warrant. Part IV provides for judicial investigation into the resources of the dissolved corporation, whether or not Petitioner wishes to avail himself of the permissive Part III.

Petitioner filed Election by Respondent to Stand on His Inherent Right to Appear in Person, together with Motion for New Trial, or Petition for Rehearing. The fifth ground for the latter:

> "5. The question as posed (p. 3) and the conclusion reached effectually convict Respondent as guilty of the crime of unauthorized practice of law, in transgression of statutory and constitutional safeguards, notably Article I, Sec. 11, of the Hawaii Constitution, and the due process and equal protection clauses of the U.S. Constitution, Amendment 14."

Without argument, the Hawaii Supreme Court entered on August 3, 1971, its Order Denying and Dismissing . . . Election by Respondent to Stand on His Inherent Right to Appear in Person, Motion for a New Trial, or Petition for Rehearing.

On August 6, 1971, at 1:07 o'clock P.M., Petitioner filed Motion to Reconsider Denial of Motion for New Trial or Petition for Rehearing, the second ground of which raises a federal question:

"2. Denial without hearing of Motion for New Trial, made pursuant to Rule 59(a), H.R.C.P., has transgressed the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution."

The motion was denied without hearing by order entered August 10, 1971.

Later on August 6, 1971, at approximately 3:50 o'clock P.M., Petitioner presented to the clerk of the Hawaii Supreme Court a Motion to Reconsider Denial of Respondent's Election to Stand on His Inherent Right. The first ground therefor contends, inter alia:

"... This Court's sua sponte denial of Respondent's freedom of choice by the subject Order of August 3, 1971, has abridged Respondent's privileges and denied him due process of law, guaranteed by the 14th Amendment to the U.S. Constitution."

The clerk of said court declined to stamp the motion as filed or lodged, but retained possession.

On August 10, 1971, the Hawaii Supreme Court entered its Order Enjoining William S. Ellis, Jr. ... from Engaging in the Unauthorized

Practice of Law; Order Appointing Master to Conduct an Evidentiary Hearing. The latter component was an order of reference to a judge of the state circuit court, as master, implementing Parts III and IV of the June 25, 1971, opinion.

By certified mail on August 13, 1971, Petitioner presented to the clerk of the Hawaii Supreme Court an Affidavit of Lodging in respect to the August 6, 1971, Motion to Reconsider Denial of Respondent's Election to Stand on His Inherent Right. On August 18, 1971, the subject motion and affidavit, together with Petitioner's covering letter, were returned by registered mail to Petitioner by the clerk of said court. The clerk's letter of transmittal, approved by the chief justice, informed Petitioner that:

> "They have not been filed and are being returned to you because of your lack of standing to file said documents. Any other documents or pleadings which you may improvise for filing in this case will be returned without filing."

That is to say, Petitioner was no longer allowed to defend pro se in No. 5044, in which

he was charged with the crime of unauthorized practice of law.

In resistance to the judicial investigation into the resources of the dissolved corporation, Petitioner presented by certified mail to the clerk of the Hawaii Supreme Court his Motion to Vacate Order and Alternative Motion to Amend Judgment, raising federal questions.

Said motions and Petitioner's covering letters were returned by registered mail by the clerk of said court to Petitioner. By certified mail, Petitioner then transmitted copies of all rejected papers directly to each of the justices of the Hawaii Supreme Court. The covering letters and all papers were returned to Petitioner by registered mail.

C. Upon Removal of Injunction Proceeding, Federal District Court Permitted Petitioner to Appear Without Counsel and Held Scope of State Injunction to Be Confined to State Courts.

Having thus been denied access to the Hawaii Supreme Court to continue appearing in his own defense to a criminal charge, Petitioner

removed No. 5044 to the U.S. District Court for the District of Hawaii (hereinafter called the "federal district court") on September 24, 1971, where the case was docketed as Misc. No. 71-1564.

Unknown to Petitioner, a Final Judgment (Appendix B) had been entered the previous afternoon in the state appellate court, which ordered as follows:

> "IT IS HEREBY ORDERED AND ADJUDGED that William S. Ellis, Jr., trustee for the creditors and stockholders of Kula Development Corporation, is permanently enjoined from engaging further in the unauthorized practice of law."

By certified mail on September 24, 1971, Petitioner transmitted to the clerk of the Hawaii Supreme Court, via counsel specially appearing for the purpose, a copy of his removal petition and appendices thereto. Said appendices include all papers which the clerk of the Hawaii Supreme Court refused to retain for filing, together with relevant correspondence and proof of mailing and

receipt. Thus, all such papers are now part of the record in No. 5044.

Petitioner represented himself in the removed case, where the mortgagee plaintiffs in the state foreclosure suit and prosecutors in No. 5044 sought to intervene and move for remand. Intervention was denied, but counsel for the mortgagees was permitted to appear amicus curiae.

On October 1, 1971, Petitioner filed in Misc. No. 71-1564 an Amended Petition for Removal of Criminal Proceeding Against Person Denied Civil Rights, contending inter alia:

> "6. That the proceeding has been instituted and prosecuted under the inherent power of the state court, which is limited by Sec. 605-16, H.R.S., to proceedings for contempt and for violations of rules or orders of court. Therefore, the subject matter jurisdiction of the state court in the premises is criminal in nature.
>
> "7. Petitioner has not been duly charged nor has he had a hearing in accordance with law on the criminal offense of unauthorized practice of law . . . . "

"11. That . . . petitioner is denied and is unable to enforce in the courts of the State of Hawaii rights secured to him by laws of the United States providing for equal rights of citizens of the United States, to-wit: (a) the rights to equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States; and (b) the rights under Sec. 1981, 42 U.S.C.A., to sue, to be a party, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens elsewhere in the United States. (White citizens are in the minority in Hawaii.)"

After a hearing upon the suggestion of lack of federal jurisdiction, the federal court concluded inter alia in its order of remand entered October 22, 1971:

"A review of the proceedings had before the Supreme Court of Hawaii convinces this Court that the matter was in no way a criminal prosecution, though so labeled by Mr. Ellis. It was in the nature of a special proceeding before the Supreme Court of Hawaii and within its inherent power to regulate the practice of law before the state courts of Hawaii." (Emphasis added.)

Nothing in the records of No. 5044 or Misc. No. 71-1564 indicates that said Order of Remand was executed by the clerk of the Federal District

Court by mailing a copy to the clerk of the Hawaii Supreme Court, pursuant to Sec. 1447(c), 28 U.S.C.A.

Appearing without counsel, Petitioner appealed the remand order to the U. S. Court of Appeals for the Ninth Circuit (hereinafter "court of appeals") and petitioned this Honorable Court for a writ of certiorari to the Hawaii Supreme Court to review the Final Judgment in No. 5044 (Appendix B). The appeal was voluntarily dismissed, and the petition for certiorari was denied (405 U.S. 1075).

D. Upon Removal of Foreclosure Suit, Federal District Court and Court of Appeals Permitted Petitioner to Appear Without Counsel.

The mortgagee plaintiffs did not attempt to execute the decree of foreclosure entered on October 30, 1970, in Civil No. 26954. Late in 1972, they sought and were denied an entry of "default" against Petitioner for failure to employ counsel in the foreclosure suit. Next they moved for a second trial therein, stating no grounds.

The motion was granted and a copy served on Petitioner on March 16, 1973.

On April 6, 1973, Petitioner and creditor defendants who had no notice of proceedings in the state circuit court for a second trial, jointly removed Civil No. 26954 to the federal district court, where the case was docketed as Civil No. 72-3792. Petitioner represented himself therein, where he filed an affidavit attesting inter alia as follows:

> "3. Removal of the instant action was not effectuated for purposes of delay. Rather, said action was removed in good faith, as a sincere attempt to achieve equal protection of the laws respecting (a) due notice and an opportunity to be heard, (b) the right of a natural person to appear pro se as a party to litigation, and (c) the restriction of successful plaintiffs to one trial where defendants do not procure a new trial or reversal.
>
> "4. Affiant verily believes that he has been treated as persona non grata in the State Courts because of circumstances of birth, residence, race, consensus politics, debtor status, and pro se status. As such, he is a 'nigger' in the predominantly Nisei, consensus-controlled State Courts, unable to enforce his equal rights as a Mainland-

born, white, pro se debtor, under the laws and constitutions of the State of Hawaii and the United States."

In an abusive order of remand prepared by then counsel for the mortgagee plaintiffs (Edward A. Jaffe, Esq.) and entered without prior submittal to the parties affected, the federal court assessed Petitioner and co-defendants $250 in attorney's fees under Rule 11, F.R.C.P., for removing the foreclosure suit in bad faith.

The order of remand was appealed to the court of appeals, where it was docketed as C.A. No. 73-2350. Motions were made and opposed by Petitioner, and he briefed and argued the appeal representing himself. The court of appeals affirmed the penalty and otherwise dismissed the appeal.

E. Petitioner Has Been Fined $250 by Hawaii Supreme Court for Appearing Without Counsel Before Federal Courts.

On December 26, 1973, after briefing and prior to argument of No. 73-2350 in the court of appeals, Edward A. Jaffe, Esq., filed his own

motion as private prosecutor to initiate a criminal contempt proceeding before the Hawaii Supreme Court captioned in No. 5044. He sought an order to show cause why Petitioner should not be held in contempt of the Final Judgment entered therein (Appendix B) for having appeared without counsel in removed Civil No. 73-3792 (the foreclosure suit) in the federal district court and in No. 73-2350 in the court of appeals.

The Hawaii Supreme Court issued the requested order on February 6, 1974, which directs the Attorney General of the State of Hawaii to appear as amicus curiae and directs both Petitioner and the Attorney General to file memoranda. In view of Petitioner's lack of standing to file memoranda in the case, as determined by the clerk of the appellate court on August 18, 1971, he filed evidentiary affidavits on March 5 and 12, 1974, as substantial compliance with the order. He stood on the affidavits without oral argument or employment of counsel.

The affidavits raise the following federal questions:

1. Lack of state jurisdiction over the federal subject matter of the criminal contempt proceeding.

2. Lack of jurisdiction in the Hawaii Supreme Court to regulate the practice of law in the federal district court and court of appeals.

3. Immunity from relitigation in the Hawaii Supreme Court of the scope of the Final Judgment in No. 5044, which had been finally determined by the federal district court in its order of remand on October 22, 1971, to relate to proceedings "before the state courts of Hawaii."

4. Immunity from relitigation in the Hawaii Supreme Court of the tacit determination by the federal district court and court of appeals, as well as this Honorable Court in 405 U.S. 1075 (1972), of Petitioner's right to appear without counsel in the federal courts.

5. Interference by the Hawaii Supreme

Court with the appeal pending in C.A. No. 73-2350.

6. Because of its uncertainty, the Final Judgment in No. 5044 is void and in violation of the 14th Amendment to the U.S. Constitution.

7. By appearing without counsel, Petitioner was not practicing law, as the term is understood in the federal court system.

8. When appearing for himself in the federal courts, Petitioner relied upon Sec. 1654, 28 U.S.C.A. ("parties may plead and conduct their own cases personally or by counsel"), in accordance with the rationale of Willheim v. Murchison, 206 F. Supp. 733, 736.

9. Utilization of federal court proceedings by prosecuting counsel to entrap Petitioner into commission of an alleged crime under state law.

The first affidavit filed by Petitioner verified, inter alia:

> "8. That at all times relevant hereto Affiant understood and now understands the Order to Show Causes dated and entered herein on October 13, 1970, to mean 'the

Courts of the State of Hawaii' within the supervisory jurisdiction of this Court conferred by the Constitution of Hawaii and pertinent statutes, specifically: this Honorable Court, Circuit Courts, the Land Court, and District Courts.

"9. That at all times relevant hereto Affiant understood and now understands 53 Haw. 23, 25, footnote 1, to refer to this Honorable Court's inherent power to regulate the practice of law in 'the Courts of the State of Hawaii.'

. . .

"18. That if said Final Judgment entered herein on September 23, 1971, was and is intended by this Court to regulate the practice of law in the federal courts, such intent was not and is not apparent to Affiant . . .

"19. That, for all of the foregoing reasons, Affiant verily believes that he did not violate the Final Judgment entered herein on September 23, 1971.

"20. That, if this Court should hold that the actions complained of were in violation of said Final Judgment, for all of the foregoing reasons Affiant was unaware that he was in violation of same and did not so intend."

The second affidavit filed by Petitioner verified, inter alia:

"5. That Affiant verily believes that the courts mentioned in paragraphs 12-16 of the Counter-Affidavit tacitly decided that his pro se appearance in federal court does not come within the definition of 'practice of law' under the Constitution, statutes, and case law of the United States; that to Affiant the word 'tacit' in this context means 'implied or indicated, but not actually expressed,' in the same sense that a court tacitly determines its own jurisdiction; that is to say, Affiant believes that the federal courts took cognizance that he was not practicing law, as the term is defined in the federal court system, and/or that his appearance prose in the federal courts does not constitute a violation of the Final Judgment of this Court.

. . .

"8. That Affiant made his Counter-Affidavit and now clarifies and amplifies same with the understanding that this Court has elected to proceed under Sec. 1077(3)(b) of the Hawaii Penal Code, relating to petty misdemeanors, to try the offense defined in Sec. 1077(g); that said Counter-Affidavit, as amplified, is framed to the best of Affiant's ability in terms of defenses available to Affiant under the Hawaii Penal Code and in consideration of the definition contained therein of the word 'intentionally' as an element of the offense charged."

The defenses interposed in the affidavit relate to the following sections of the Hawaii Penal

Code (Act 9, S.L.H. 1972, Sec. 1): Sec. 114 (proof beyond a reasonable doubt); Sec. 115 (defenses); Sec. 206(1) (definition of states of mind; "intentionally"); Sec. 218 (ignorance or mistake as a defense); Sec. 220 (ignorance or mistake of law; belief that conduct not legally prohibited).

Notwithstanding the foregoing verification of an intent which as a matter of law since Blackstone would exonerate Petitioner (State v. Fletcher Trust Co., 5 N.E.2d 538, 539, 540), he was found guilty of criminal contempt in an opinion rendered May 3, 1974 (Appendix C). Petitioner was fined $250, which he paid on June 10, 1974.

Judgment of Contempt (Appendix D) was entered against Petitioner on June 13, 1974.

REASONS FOR GRANTING THE WRIT

A. The Fundamental Federal Question Involved Has Not Been Heretofore Decided by This Court.

Do all natural persons in the United States, including Hawaii, have an equal right under Sec.

1654, 28 U.S.C.A., to prosecute and defend their own cases without counsel in the federal courts?

The answer is so obvious that since the subject statute was originally enacted in 1789 it appears to Petitioner that the precise question has never been decided by this Honorable Court.

Now a state court of last resort reaches out under an apparent misconception of its inherent power and fines a U.S. citizen $250 for exercising what he sincerely believes to be his fundamental right under Sec. 1654.

> "Individuals have long been permitted to manage, prosecute and defend their own actions, but this is not considered to be the practice of law. . . . One does not practice law by acting for himself any more than he practices medicine by rendering first aid for himself." Nelson et al. v. Smith et al., 154 P.2d 634.

The amount of the fine is so nominal that petitioning this Court for certiorari would and has posed an inordinate economic burden and entailed a workload all out of proportion to the sum involved. This circumstance, coupled with the

workload of this Court, might well have been calculated by the Hawaii Supreme Court to render it immune from any effective redress of its unprecedented actions.

However, the principle of free and equal access to the federal courts is so fundamental that it has motivated Petitioner to shoulder the considerable burden of petitioning this Court for relief. It now behooves this Court, in turn, to open its doors to Petitioner in order to restore and preserve inviolate the free and equal access to federal courts by all natural persons mandated by Congress under Sec. 1654, 28 U.S.C.A.

B. The Fundamental Federal Question Involved Has Been Decided Contrary to the Rationale of Federal Cases.

This Court in Osborn v. United States, 22 U.S. (9 Wheat.) 738, 829, 856-859, points out that jurisdiction depends not upon an interest but upon the party of record.

> "In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really

> concerned in interest. The universally received construction in the case is, that jurisdiction is neither given nor ousted by the relative situations of the parties concerned in interest, but by the relative situation of the parties named on the record. No case can be imagined in which the existence of an interest out of the party on the record is more unequivocal . . . [T]he jurisdiction of the court depends, not upon the interest, but the actual party on the record." (Emphasis added.)

Petitioner was the actual party on the record in the civil actions involving him as statutory liquidator of Kula Development Corporation. Thus, he had a right to appear in his own case in the federal court, pursuant to Sec. 1654, 28 U.S.C.A. The Hawaii Supreme Court ruled contrary to the rationale of Osborne, as more explicitly applied to parallel circumstances in Willheim v. Murchison, 206 F. Supp. 733, 736, relating to a derivative stockholder's action.

> "The only issue is whether he may conduct such action pro se. Section 1654 of 28 U.S.C. states that 'parties may plead and conduct their own cases personally or by counsel. The moving parties urge that this is not Phillip's own case, but a representative action brought on behalf of some

other party, and therefore he cannot conduct it personally. . . .

". . . To hold that a representative action is not the case of the plaintiff bringing it is to confuse substance with procedure. . . .

"The argument of the defendants based on Section 1654 proves too much, since if a representative action is not to be regarded as the action of the plaintiff for purposes of this section then this section would not even cover appearance by counsel in such actions. Phillip's representation of the other stockholders results from the fact that he is permitted to bring this action as plaintiff and not from the fact that as plaintiff he chooses to appear for himself.

". . . [H]is right as an individual to appear in his own action is one which cannot be denied by this court." (Emphasis added.)

In punishing Petitioner for appearing in his own action in the federal courts, the Hawaii Supreme Court held contrary to the federal authority of Willheim, which expressly construes Sec. 1654, 28 U.S.C.A. It is respectfully submitted that this Court should apply Willheim to the circumstances of the case at bar.

The decision of the Hawaii Supreme Court is also in conflict with the rationale of Adams v. United States, 317 U.S. 269, 279, a criminal case relating to correlative rights to appearance by counsel and without counsel under the Sixth Amendment to the U.S. Constitution.

> "The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalities. They rest in considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. . . . Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant. . . ."

Certainly, Petitioner had a correlative right under the 14th Amendment of the U.S. Constitution to present his case fully without counsel in No. 5044, the injunctive and criminal contempt proceeding which does not involve the trust estate. In denying Petitioner the right to file motions and argue in his own defense as the accused in No. 5044 since August 18, 1971, the

Hawaii Supreme Court has held contrary to the fundamental precepts of Adams.

C. Only This Court Has the Power to Accord Petitioner Appellate Relief.

No. 5044 is an original proceeding in a state court of last resort.

The criminal contempt judgment sought to be reviewed relates to proceedings in the federal courts now concluded. The Hawaii Supreme Court paid no heed to the express and tacit determinations of those courts.

Petitioner now has nowhere to turn but to this Court to vindicate his rights under Sec. 1654, 28 U.S.C.A., to appear pro se in the federal courts.

CONCLUSION

For the foregoing reasons, Petitioner urges the Court to grant the writ of certiorari to review the judgment of the Supreme Court of the State of Hawaii.

DATED: Honolulu, Hawaii, November 7, 1974.

Respectfully submitted,

/s/ William S. Ellis, Jr.
WILLIAM S. ELLIS, JR.
12 N. King Street, Rm. 17
Honolulu, Hawaii 96817

Petitioner, pro se

Appendix A

Syllabus

In the Matter of the Unauthorized Practice of Law of MR. WILLIAM S. ELLIS, JR., Trustee for the Creditors and Shareholders of Kula Development Corporation

No. 5044

MOTION FOR PERMANENT INJUNCTION

June 25, 1971

RICHARDSON, C.J., MARUMOTO, ABE, LEVINSON AND KOBAYASHI, JJ.

CORPORATIONS — *dissolution and forfeiture of franchise — actions by or against corporation after dissolution — statutory liquidators.*

The former directors as statutory liquidators are proper and necessary parties to legal proceedings aimed at winding up the affairs of a dissolved corporation. HRS § 416-124.

Syllabus

SAME — *same — effect of dissolution on corporate property* — HRS § 416-124.

The word "title" in HRS § 416-124 is loosely used for the property of a dissolved corporation actually belongs to those persons who were stockholders at the time of its dissolution, the right to possession passing to the former directors by force of the statutory provision making them statutory liquidators to settle the corporate affairs.

ATTORNEY AND CLIENT — *retainer and authority — rights of litigants to act in person* — HRS § 605-2.

HRS § 605-2 permits a person to represent himself pro se in the courts of this state if that person by the substantive law has the right sought to be enforced, or put differently, is the real party in interest.

CORPORATIONS — *dissolution and forfeiture of franchise — actions by or against corporation after dissolution—real parties in interest.*

Stockholders of a dissolved corporation are the real parties in interest upon claims in favor of or against the corporation at the time of dissolution, their interests subject to the liens of creditors.

CORPORATIONS — *dissolution and forfeiture of franchise — statutory liquidator — rights and duties.*

ATTORNEY AND CLIENT — *retainer and authority — rights of litigants to act in person.*

The function of a statutory liquidator of a dissolved corporation (HRS § 416-124) does not include the right to present argument pro se because in this capacity he is representing the interest of others and is engaged, therefore, in the unauthorized practice of law.

CONSTITUTIONAL LAW — *due process of law — deprivation of property — actions by or against a dissolved corporation.*

Due process requires that in judicial proceedings winding up the affairs of a dissolved corporation, a stockholder or creditor may not be deprived of his property without his "day in court".

ATTORNEY AND CLIENT — *unauthorized practice of law — unique exception.*

Where a statutory liquidator, not an attorney in this state, makes a showing that the assets of a dissolved corporation are insufficient to hire an attorney for purposes of judicial proceedings aimed at winding up corporate affairs, public policy and constitutional guarantees dictate that in this limited situation this court make an unique exception to our prohibition against one engaging in the unauthorized practice of law, and that he be allowed to perform the necessary legal services.

OPINION OF THE COURT BY KOBAYASHI, J.

This is an original action[1] brought before this court by James S. Campbell, attorney, seeking a permanent injunction to enjoin the alleged unauthorized practice of law by William S. Ellis, Jr., as trustee for the creditors and stockholders of Kula Development Corporation, a dissolved Hawaiian corporation.

At the time of corporate dissolution Mr. Ellis was both a stockholder and a director. By operation of law[2] he and other directors became trustees for the creditors and stockholders. The records at the State Department of Regulatory Agencies show that thereafter all of Mr. Ellis' co-trustees resigned leaving him as sole trustee.

Mr. Campbell represents one of several creditors of the dissolved corporation. In a First Circuit Court case between his clients as plaintiffs against Kula Development Corporation, et al., as defendants, Mr. Campbell complains that Mr. Ellis practiced law without authority.

Mr. Ellis is not licensed to practice law in this or any other jurisdiction. It is undisputed, however, that in exercising his power as trustee and fulfilling this responsibility, Mr. Ellis has engaged in the practice of law. HRS § 416-124 provides as follows:

> "*Trustee; powers, liabilities, duties.* The title to all assets and property, real, personal, and mixed, belonging to the corporation shall, immediately upon the dis-

---

[1]This court has inherent power to regulate matters before it regarding the practice of law.

Hawaii Constitution art. V, § 1 provides in part:

"The judicial power of the State shall be vested in one supreme court, circuit courts, and in such inferior courts, as the legislature may from time to time establish."

Rules of the Supreme Court, State of Hawaii (1968):

"16(d): *Limitations.* The jurisdiction of this court and the other courts of the State of Hawaii to grant appropriate relief in causes involving unprofessional conduct or unauthorized practice of law shall not be deemed to be limited, restricted or abrogated by anything contained in this rule."

See In re Integration of the Bar, 50 Haw. 107, 432 P.2d 887 (1967).

[2]HRS § 416-123.

solution thereof, * * * vest in the trustee or trustees for the creditors and stockholders or members of the corporation dissolved.

"Under the name of the trustee or trustees * * * the trustee or trustees shall have power: to sue for and collect the debts, claims, and demands due to the corporation, or compound and settle any claims as they may deem best; to have, hold, reserve, sell, and dispose of property, real, personal, and mixed; to adjust and pay all debts of the corporation dissolved; * * * to exercise all powers of the dissolved corporation; * * * to divide among the stockholders * * * moneys and other properties that remain after paying the debts and necessary expenses; and they shall be jointly and severally liable to the creditors and to the stockholders * * * to the extent of the corporation property which shall come into their hands. * * *"

Mr. Ellis claims that because of lack of funds in the dissolved corporation, he, as trustee, cannot pay for the services of an attorney and thus is compelled to do all the necessary legal work.

The novel question for us to resolve is whether Mr. Ellis as said trustee, in his pro se practice of law, represents himself as trustee or is, in effect, actually representing the interest of another person and thus is guilty of unauthorized practice of law.

I. THE TRUSTEESHIP OF MR. ELLIS

At common law, in the absence of statute, when a corporation was effectively dissolved its existence as a legal entity ceased. Dissolution terminated its power to sue or be sued in its corporate name, and extinguished all debts due to or from it.[3]

[3]State v. Libby, 238 Mo. App. 36, 42, 175 S.W.2d 171, 173-74 (1943). *Note, Suits by and Against Dissolved Corporations*, 48 Iowa L. Rev. 1006, 1007 (1963).

To abrogate this rule of the common law, statutes have been enacted in all jurisdictions pertaining to this subject of litigation by and against a dissolved corporation.[4] These statutes take various forms but all are remedial in purpose, removing the common law incapacity of a dissolved corporation to sue or be sued.

Some statutes extend the life of the corporation permitting it to serve as a named party litigant.[5] Others, such as ours here in Hawaii, HRS § 416-123, treat the existence of the corporation as terminated upon dissolution but nonetheless allow suits to be brought or continued. These statutes resulted from a demand by stockholders and creditors for equitable relief and embodied the "trust fund theory" by authorizing the directors at the time of dissolution to serve as trustees.[6] In this capacity the former directors are proper and necessary parties to legal proceedings aimed at winding up the affairs of the dissolved corporation. *State* v. *Libby, supra* at 43.

Although captioned "trustee" by these statutes, a more accurate characterization for a former director is that of "statutory liquidator".[7] His function is simply to liquidate the assets possessed as expeditiously as sound business judgment permits.[8] To this end the equally amorphous word "title" is found in HRS § 416-124, *supra,* and in similar statutes.

The word "title" in this context is loosely used. The property of a dissolved corporation actually *belongs to* those per-

---

[4]W. Fletcher, 16A Cyclopedia of Corporations § 8143, p. 316 (perm. ed. rev. vol. 1962).

[5]*Id.*

[6]*Id.* at 322-23. *Note, Suits by and Against Dissolved Corporations, supra* at 1010.

[7]United States v. Krueger, 121 F.2d 842, 844 (3rd Cir. 1941).

See also Rossi v. Caire, 186 Cal. 544. 199 P. 1042 (1921) applying the phrase "trustees in liquidation" at 549.

For criticism of the term "trust" *see* IV Pomeroy, Equity Jurisprudence § 1046 at p. 98 (5th ed. 1941), where in reference thereto the author states " * * * [it] can only be called so by way of analogy and metaphor."

[8]*See* 16A Fletcher, *supra,* § 8178, p. 415.

sons who were stockholders at the time of its dissolution, but the right to possession passes to the former directors by force of the statutory provision making them statutory liquidators to settle the corporate affairs. *Jones v. Peck*, 63 Cal. App. 397, 401-02, 218 P. 1030, 1032 (1923).[9] In substance therefore, Mr. Ellis as statutory liquidator possesses the property of the former stockholders of the Kula Development Corporation with the power to dispose of so much thereof as is necessary to pay creditors who have a lien upon it for their own security.[10]

II. THE RIGHT OF ONE TO REPRESENT HIMSELF

Mr. Ellis in appearing pro se claims a right to do so under HRS § 605-2 which in part provides:

> "[N]othing in this chapter shall prevent any person, plaintiff, defendant, or accused, from appearing in person before any court, or justice, and there prosecuting or defending *his own cause*, without the aid of legal counsel." (Emphasis added)

Our statute's import mirrors that of an early federal law.[11] While authoritative analysis of HRS § 605-2 is lacking, in matters relating to the conduct of business before our courts the construction of a counterpart federal provision is highly persuasive. *Ellis v. Crockett*, 51 Haw. 45, 61, 451 P.2d 814, 824 (1969). We find, therefore, federal pronouncements on 28 U.S.C.A. § 1654, *supra* n.11, helpful in construing the right asserted.

Clearly by statute or otherwise this right of self-represen-

---

[9] *Id. at 420.*

[10] *Id.*

See Rossi v. Caire, *supra* at 552-53, where in discussing the subject of "title" the court states that "* * * [assuming] legal title to the property had solely vested in the trustees designated by the statute, * * * [s]ubject to * * * the payment of creditors, the former stockholders were the sole beneficiaries and the absolute owners in equity of the property."

[11] Judiciary Act of 1789, § 35, 1 Stat. 73, 92 (1789) provided that "in all the courts of the United States, the parties may plead and manage their own causes personally * * *."

This identical language is now found in 28 U.S.C.A. § 1654 (1966).

tation is available to a person in a civil proceeding.[12] But regardless of the right's derivation or the proceeding where it is invoked, the question is whether one seeking to represent himself pro se is a person who by the substantive law has the right sought to be enforced. Put differently, is Mr. Ellis, in conducting the litigation, the real party in interest? *Heiskell v. Mozie*, 82 F.2d 861, 863 (D.C. Cir. 1936). We think not.

As indicated by the foregoing discussion (Part I), after dissolution, the stockholders of the Kula Development Corporation were the real parties in interest upon all claims in favor of or against this corporation at the time of dissolution. *Clark Estate Co. v. Gentry*, 362 Mo. 80, 91, 240 S.W.2d 124, 130 (1951). Their interests, in turn, were subject to the liens of creditors.

On the other hand, in legal proceedings aimed at winding up the former corporation's affairs, the interest of Mr. Ellis as trustee is remedial in nature and premised upon procedural necessity. *State v. Libby, supra.* The paucity of precedent notwithstanding, as Mr. Ellis' status of "trustee" intended to insure nothing more than the orderly administration of assets, he may not claim his statutory function includes the right to present argument pro se in the courts of this state. In this capacity he is representing the interests of others, and in judicial proceedings it is our opinion that he is engaged in the unauthorized practice of law.

---

[12]Price v. Johnston, 159 F.2d 234 (9th Cir. 1947), *cert. granted* 331 U.S. 804 (1947).

Apart from statute the right is rooted in the common law. *See* following federal and state civil cases: Osborn v. United States, 22 U.S. (9 Wheat.) 738, 829 (1824); Hightower v. Hawthorn, 12 F. Cas. 142 (No. 64, 780) (Sup. Ct. Ark. 1826); Arthaud v. Griffin, 202 Ia. 462, 464, 210 N.W. 540, 541 (1926); Americus v. McGinnis, 128 Wash. 28, 30, 221 P. 987, 988 (1924).

In the criminal context authorities are divided whether this right is constitutional as well as statutory. Dearinger v. United States, 344 F.2d 309 (9th Cir. 1965) at 311, n.2.

But whether constitutional or statutory, the right is not absolute and may be qualified under certain circumstances (criminal proceeding). United States v. Davis, 260 F. Supp. 1009, 1019 (E.D. Tenn. 1966).

III. STOCKHOLDERS AND CREDITORS ENTITLED TO PROCEDURAL DUE PROCESS

The anomaly of this situation gives rise to a constitutional infirmity wherein a stockholder's or creditor's property is subject to deprivation without him having his "day in court".[13] Basic requisites of "due process" guarantee that where property rights may be affected, notice and an opportunity to be heard must be afforded to all interested persons. *Mortensen v. Emp. Ret. Syst. Trustees*, 52 Haw. 212, 219-21, 473 P.2d 866, 871-72 (1970); *Territory* v. *Jennie L. Aona, et al.*, 43 Haw. 253, 255 (1959). How then are these rights to be protected?[14]

Because of the constitutional dilemma presented, public policy dictates that an exception be made at this time to the prohibition against one engaging in the unauthorized practice of law.[15] In the limited situation where the statutory liquidator makes a showing that corporate funds are unavailable for the hiring of counsel, he may perform the necessary legal services.

---

[13]Weinacht v. Bower, 140 Ore. 527, 533, 14 P.2d 622, 625 (1932).

[14]Neither party briefed or argued the issue whether under the facts at hand "a stockholder" in this capacity could appear pro se in his own behalf as well as the representative of other stockholders. At this juncture we do not reach this issue.

In a derivative action a stockholder was permitted to appear pro se. Willheim v. Murchison, 206 F. Supp. 733 (S.D.N.Y. 1962), *appeal dismissed*, 312 F.2d 399 (2nd Cir. 1964); discussed in 17 Rutgers L. Rev. 651 (1963).

Under a similar statutory scheme, the right to assert or defend claims vests by law *exclusively* in the "statutory liquidators" of a dissolved corporation. Clark Estate Co. v. Gentry, *supra* at 86-87.

However, a statutory liquidator may be personally liable to a stockholder or creditor for breach of his duty to act with reasonable care and prudence in settling the corporate affairs. McClean v. Bradley, 282 F. 1011 (N.D. Ohio 1922), *aff'd* 299 F.2d 379 (6th Cir. 1924), *cert. denied*, 266 U.S. 619 (1924); King v. Coosa Valley Mineral Products Co., 283 Ala. 197, 215 So. 2d 275 (1968); Mengel Co. v. Pierson, 99 N.J. Eq. 436, 132 A. 78 (1926).

See HRS § 416-125 providing for an accounting action by stockholders or creditors.

[15]Hawaii Const. art. V, § 6 provides:

"The Supreme Court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure, and appeals, which shall have the force and effect of law."

IV. CONCLUSION

Again reiterating, the cornerstone upon which we provide this exception is the claim of insufficient assets. Mr. Ellis asserts that assets are insufficient. Some light is shed on this assertion in a trial statement by Mr. Ellis that he lacks "liquid assets". These terms, however, depending on the circumstances, may be far from synonomous in application. Although an inventory of property has not been provided to this court, it is our understanding that real estate comprises a substantial portion of, if not the total, value of the assets of the former corporation.

In order to determine the current worth of all property involved, we shall appoint under separate order a circuit judge of the first circuit as master to hold an evidentiary hearing on this matter. Should sufficient assets in some form be available to retain an attorney, Mr. Ellis will be directed to do so.[16] If not, to insure those with property rights of their day in court Mr. Ellis, as trustee, will be allowed to continue pro se in his practice of law.

An order will so issue.

James S. Campbell (*Cades, Schutte, Fleming & Wright* of counsel) for the motion.

William S. Ellis, Jr., pro se, contra.

CONCURRING OPINION OF ABE, J.

I agree with the majority of this court on points I and II and the conclusion that Mr. Ellis "is engaged in the unauthorized practice of law."

The due process issue discussed in point III of the court's decision was not befc e us because Mr. Ellis did not raise that issue. Therefore, believe that it is a mistake for this court not only to raise but also to decide the issue sua sponte, especially without any briefing or argument on the question.

[16]A statutory trustee may always employ agents to aid him in the performance of his duties should these services be necessary for purposes of winding up the affairs of the corporation. *See* 16A Fletcher, *supra*. § 8179, p. 421 at 422-23.

Appendix B

IN THE
SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1970

In the Matter of the Unauthorized Practice of Law of WILLIAM S. ELLIS, JR., trustee for the creditors and shareholders of Kula Development Corporation	)

FINAL JUDGMENT

This matter having been referred to Judge Masato Doi as Master to conduct an evidentiary hearing in accordance with this court's order filed August 10, 1971, and the Master having filed a report stating that because "of the sole trustee's refusal to cooperate in any way" he is "unable to make an intelligent assessment of the corporation's financial condition",

IT IS HEREBY ORDERED AND ADJUDGED that William S. Ellis, Jr., trustee for the creditors and stockholders of Kula Development Corporation, is permanently enjoined from engaging further in the unauthorized practice of law.

DATED: Honolulu, Hawaii, September 23, 1971.

BY THE COURT:

/s/ William S. Richardson
Chief Justice

Appendix C

Syllabus

In the Matter of the Unauthorized Practice of Law of MR. WILLIAM S. ELLIS, JR., Trustee for the Creditors and Shareholders of Kula Development Corporation

NO. 5044

MOTION FOR ORDER TO SHOW CAUSE

MAY 3, 1974

RICHARDSON, C.J., LEVINSON, KOBAYASHI and OGATA, JJ., and CIRCUIT JUDGE VITOUSEK ASSIGNED TEMPORARILY BY REASON OF VACANCY

INJUNCTIONS — *unauthorized practice of law — definition.*

A final judgment of a state's highest court permanently enjoining a person from engaging further in the unauthorized practice of law is not impliedly limited in applicability to the state court system, but also clearly enjoins such person from the practice of law in a federal court of such state.

SAME — *same — authority of a state's highest court.*

A state's highest court has the authority to enjoin a person's unauthorized practice of law in a federal forum within that state, so long as there are no rules, orders, or practices of the relevant federal court that would conflict with the terms of such injunction.

SAME — *same — enforceability.*

Proper action taken by the highest court of a state to punish for violation of the terms of an injunction forbidding the unauthorized practice of law in a federal forum is not inconsistent with any exclusive jurisdiction vested in a federal forum, so long as there are no rules, orders, or practices of the relevant federal court that would conflict with the terms of such injunction.

Per Curiam. As one of the very few and unique exceptions to the general rule that one not licensed to practice law before this Court is absolutely forbidden to engage in legal practice within this State, we held in *In Re Ellis*, 53 Haw. 23, 31, 487 P.2d 286, 291 (1971), *cert. den.*, 405 U.S. 1075 (1972), that Mr. William S. Ellis, Jr., as trustee for the creditors and stockholders of Kula Development Corporation, a dissolved Hawaii corporation, might continue to render services of a legal nature to the dissolved corporation, providing that a determination of imperative financial necessity therefor be subsequently made by a master to be appointed pursuant to an order of this Court.

The key subsequent events relevant to, and following, our

decision in *In Re Ellis, supra*, are noted chronologically, *infra*. As all events pertinent herein are matters of record and, as there is, and can be, no disputation made as to the facts stated with reference to these events, we think it eminently proper to take judicial notice thereof.

(a) In an order filed August 10, 1971, pursuant to our opinion in *In Re Ellis, supra*, Mr. Ellis was enjoined from engaging further in the unauthorized practice of law, except as should be necessarily incident to an appearance (as trustee for the creditors and shareholders of the dissolved Kula Development Corporation) before a master to be designated by the assignment judge of the circuit court, first circuit.

(b) The Hon. Masato Doi, a judge of the circuit court, first circuit, having been designated as master on August 12, 1971, the matter of the financial status of Kula Development Corporation came on for initial hearing September 9, 1971. Mr. Ellis declined to appear before Judge Doi in a letter to Judge Doi, received September 9, and Judge Doi subsequently filed a notice with this Court that, in light of the knowing refusal of Mr. Ellis to appear in his capacity as sole trustee for the creditors and shareholders of Kula Development Corporation, he (Judge Doi) was unable to make an intelligent assessment of the corporation's financial condition.

(c) Subsequent to, and because of, the above noted events, Mr. Ellis, as such trustee, was permanently enjoined from engaging further in the unauthorized practice of law, by final judgment of this Court, filed September 23, 1971.

(d) Beginning in April, 1973, and extending at least through May 17, 1973, Mr. Ellis, as such trustee, filed in the United States District Court for the District of Hawaii, numerous papers, signed by him, including but not limited to, various petitions, requests for service, complaints, claims, joinder in pleadings and cross-claim, appearances, objections to motions, suggestion of recusal, motions to disqualify opposing counsel, other and novel forms of legal pleading—together with legal memoranda and appendices thereto. We conclude that these papers were prepared by Mr. Ellis himself.

(e) On February 6, 1974, pursuant to a motion filed there-

for, this Court issued to William S. Ellis, Jr., respondent, an order to show cause why he should not be held in contempt of court for violation of the injunction embodied in this court's final judgment of September 23, 1971, *supra* (c), in the particulars summarized, *supra* (d), and detailed in an 85 page affidavit in support of the motion for such order to show cause, service of which motion and affidavit on Mr. Ellis having been made December 26, 1973.

(f) Subsequently, at our request, an *amicus curiae* brief was filed by the State Attorney General, a counter-affidavit in opposition to the charge of contempt was filed by respondent Ellis, and other supplemental and answering memoranda were filed with this Court. The counter-affidavit of respondent Ellis admits and does not dispute any of the matters of record in the federal court, *supra* (d), detailed in the affidavit filed in support of the motion for an order to show cause. This matter was argued before us, March 12, 1974, the designated return date for the order to show cause.

There can be, and is, no doubt that Mr. Ellis has openly and continually ignored the order of this Court, dated September 23, 1971, enjoining him from the further unauthorized practice of law. We further observe, based upon the record and the circumstances of this case, as well as of the other cases in this Court in which Mr. Ellis has appeared *pro se*,[1] that the violations of this Court's final judgment of September 23, 1971, were not innocent, but rather that respondent Ellis intentionally, knowingly, and wilfully flouted the terms of said final judgment.

Said final judgment was absolute and unambiguous in its terms and provided clearly as follows:

> IT IS HEREBY ORDERED AND ADJUDGED that William S. Ellis, Jr., trustee for the creditors and stockholders of Kula Development Corporation, is perma-

---

[1] *See, Hamada v. Burns*, 50 Haw. 528, 445 P.2d 564 (1968), *cert. den.*, 393 U.S. 1106 (1969); *Ellis v. Crockett*, 51 Haw. 45, 451 P.2d 814 (1969); *MDG Supply v. Diversified Investment*, 51 Haw. 375, 463 P.2d 525 (1969), *cert. den.*, 400 U.S. 868 (1970); *MDG Supply v. Ellis*, 51 Haw. 480, 463 P.2d 530 (1969); *MDG Supply v. Calmes*, 52 Haw. 154, 472 P.2d 499 (1970).

nently enjoined from engaging further in the unauthorized practice of law.

The order is neither expressly nor impliedly limited in applicability to the state court system only. There is, and can be, no colorable argument made that the order is so limited by its actual terms. Furthermore, there can be no doubt that the "practice of law" engaged in by Mr. Ellis in the federal district court of this State is legally tantamount to the practice of law within this State and is thus covered by the orders and rules of the state's highest court regarding the practice of law, *Petition of Kearney*, 63 So. 2d 630 (Fla. 1953). Therefore, said "practice of law" is controlled by the injunctive order embodied in our final judgment of September 23, 1971, and Mr. Ellis is in violation thereof.

The only remaining questions then are (1) whether this Court, the highest court of the State of Hawaii, has the authority to enjoin a person's unauthorized practice of law in a federal forum, and then (2) whether action taken by this Court, the highest court of the state of Hawaii, to punish for violation of such an injunction is proper as not inconsistent with any exclusive jurisdiction vested in the federal district court. The answers to both of these legal questions are in the affirmative. *In Re Lyon*, 301 Mass. 30, 16 N.E.2d 74 (1938). That case, which we find very persuasive, clearly held that the highest judicial court of a state has jurisdiction to control the unauthorized practice of law in a federal forum.

> The regulation in the public interest of occupations and professions such as those of law, medicine and others which, if uncontrolled, may develop methods and practices inimical to the public welfare, is historically and logically, and we think also legally, a matter primarily of State concern. . . . When such practice is carried on by unauthorized persons the resulting evils are the same and reach out into the community in the same way as if the subject matter related to litigation in State courts. It would be almost impossible to separate the practice of law by persons practicing in both jurisdictions into two watertight compartments and regulation based upon an attempt to do so involving joint or complementary action

by each jurisdiction as to each item of conduct would be weak and ineffectual. 301 Mass. at 34-35, 16 N.E.2d at 76.

With regard to the second issue, as to whether the highest state court could enforce a law forbidding practice of law by unauthorized, unlicensed persons, *In Re Lyon, supra,* held that it could.

> [W]e see no reason why our policy or statute should give way in favor of persons who seek to escape State regulation of the practice of law on the ground that their practice is within the field of Federal jurisdiction, when they are not authorized to practise in that jurisdiction. Within these limits enforcement of our act according to its terms does not interfere with any Federal function. 301 Mass. at 35-36, 16 N.E.2.d at 77.

The *Lyon* court further noted that, lacking, as do we, any inclination to interfere with federal court proceedings, it would, of necessity, yield to "any valid rule, order or established practice of the federal courts controlling the practice of law in respect to matters within their jurisdiction." 301 Mass. at 35, 16 N.E. 2d at 77. Here, there are no such conflicting rules, conflicting orders, or conflicting federal court practices. There can be no such conflict for the reason that the United States District Court for the District of Hawaii by its own rules depends on this Court to determine who may or may not practice law before it.[2]

For his violation of the injunctive order in the final judgment of this Court, filed September 23, 1971, *supra* (c) in the manner set forth in summary form, *supra* (d), which is a violation of S.L.H. 1972, Act 9, § 1, sec. 1077 (1)(g), this Court, electing to proceed under S.L.H. 1972, Act 9, §1 sec. 1077 (3) (b), and all pertinent facts herein being undisputed as matters of court record, and susceptible of judicial notice, and no provision of HRS ch. 605 requiring otherwise by virtue of

---

[2] Rule 1 of the *Rules for the United States District Court for the District of Hawaii* provides in essence that, with the exception of instances not here relevant, only those who are permitted to practice in the state court system may practice in the federal district court. It is evident, then, that Mr. Ellis's practice of law before the federal district court was improper under the final judgment of this Court enjoining him from the further unauthorized practice of law. Rule 1(b), *Rules for the United States District Court for the District of Hawaii.*

HRS § 605-16.

IT IS HEREBY ADJUDGED that Mr. William S. Ellis, Jr., stands in contempt of this Court, and,

IT IS HEREBY ORDERED that Mr. William S. Ellis, Jr., pay a fine of $250 to the Chief Clerk of this Court on or before June 10, 1974.

Edward A. Jaffe (Cades, Schutte, Fleming & Wright of counsel) for the motion.

William S. Ellis, Jr., pro se, contra.

Nelson S. W. Chang, Deputy Attorney General, for State of Hawaii, *amicus curiae.*

Appendix D

IN THE
SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1973

In the Matter of the Unauthorized Practice of Law of WILLIAM S. ELLIS, JR., trustee for the creditors and shareholders of Kula Development Corporation	)

JUDGMENT OF CONTEMPT

In accordance with this Court's opinion filed May 3, 1974 in which it was adjudged that Mr. William S. Ellis, Jr. stands in contempt of this Court;

IT IS HEREBY ORDERED that Mr. William S. Ellis, Jr. pay a fine of $250.00 to the Chief Clerk of this Court on or before June 10, 1974.

DATED: Honolulu, Hawaii, this 13 day of June, 1974.

/s/ William S. Richardson
Chief Justice

Appendix E

CONSTITUTIONS AND STATUTES INVOLVED

1. Constitution of the United States

a. Amendment 14, Section 1:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, and property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U. S. C. A., Const., Amend. 14, Sec. 1, pp. 3-4.

2. Constitution of the State of Hawaii

a. Article V, Section 1:

"The judicial power of the State shall be vested in one supreme court, circuit courts, and such inferior courts as the legislature may from time to time establish. The several courts shall have original and appellate jurisdiction as provided by law." H.R.S., Vol. 1, p. 104.

3. Federal Statutes

a. Sec. 1654, 28 U.S.C.A., p. 13:

"In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

b. Sec. 1981, 42 U.S.C.A., p. 175:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other."

4. Hawaii Revised Statutes

a. Sec. 1-1, Vol. 1, p. 174:

"Common law of the State; exceptions. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases . . .; provided that no person shall be subject to criminal proceedings except as provided by the written law of the United States or of the State."

b. Sec. 416-124, Vol. 5, p. 126:

"Trustees; powers, liabilities, duties. The title to all assets and property, real, personal and mixed, belonging to the corporation shall, immediately upon the dissolution thereof . . . vest in the trustee or trustees for the creditors and shareholders . . . of the corporation dissolved.

"Under the name of the trustee or trustees of the corporation dissolved . . . the trustee or

trustees shall have the power: to sue for and collect the debts, claims, and demands due the corporation; . . . to have, hold, reserve, sell, and dispose of property, real, personal, and mixed; . . ."

c. Sec. 602-5, Vol. 7, p. 337:

"Jurisdiction and powers. The supreme court shall have appellate jurisdiction . . . ; and original jurisdiction in all questions arising under writs of error, certiorari, mandamus, prohibition, and injunction directed to circuit courts, or to circuit judges, or to magistrates, or other judicial tribunals and returnable before the supreme court. . . . Each of the justices shall have original jurisdiction and power to issue writs of habeas corpus . . ."

d. Sec. 603-22, Vol. 7, p. 349:

"Circuit judges at chambers. The judges of the several circuit courts shall have power at chambers . . . as follows:

"(1) To hear and determine all matters in equity;"

e. Sec. 603-23, Vol. 7, p. 352:

"Injunction of violations of laws and ordinances. The judges of the several circuit courts shall have power at chambers within their respective jurisdiction but subject to appeal to the supreme court to enjoin or prohibit any violation of the laws of the State . . . upon petition of the Attorney General of the State . . . even if a criminal penalty is provided for violation of the laws . . ."

f. Sec. 605-2, Vol. 7, p. 367:

"Attorneys; license required. No person shall be allowed to practice in any court of record or before a circuit judge at chambers, unless he has been duly licensed so to do by the supreme court; provided, that nothing in this chapter shall prevent any person, plaintiff, defendant, or accused, from appearing in person before any court, or justice, and there prosecuting or defending his own cause, without the aid of legal counsel."

g. Sec. 605-14, Vol. 7, pp. 371-372:

"Unauthorized practice of law prohibited. It shall be unlawful for any person . . . to engage in or attempt to engage in or to offer to engage in the practice of law . . . except to the extent that the person . . . is licensed or authorized so to do . . ."

h. Sec. 605-15, Vol. 7, p. 372:

"Enforcement. The prosecuting officers of the State shall prosecute violations of sections 605-14 to 605-17. Every violation hereof shall be prosecuted in a circuit court of the judicial circuit in which the violation is alleged to have been committed."

i. Sec. 605-16, Vol. 7, p. 372:

"Judicial power not affected. Nothing in sections 605-14 to 605-17 shall diminish, alter, or affect the inherent or statutory power of the supreme court or of any court to institute and hear proceedings against any person for contempt or for violation of rules or orders of court, or

affect any rules of court already in force, or make applicable to any proceedings brought under the sections the provisions of Chapter 729."

j. Sec. 605-17, Vol. 7, p. 372:

"Penalties. Any person violating sections 605-14 to 605-16 shall be fined not more than $250; but, upon any subsequent violation of the sections, the person shall be fined not more than $1,000, or imprisoned not more than one year, or both."

5. Hawaii Penal Code (Act 9, S.L.H., Sec. 1)

a. Sec. 1077 - Criminal contempt of court.

"(1) A person commits the offense of criminal contempt of court if:

. . .

"(g) He intentionally disobeys or resists the process, injunction, or other mandate of a court;

. . .

"(2) Except as provided in subsection (3), criminal contempt of court is a misdemeanor.

"(3) The court may treat the commission of an offense under subsection (1) as a petty misdemeanor, in which case:

. . .

"(b) If the offense was not committed in the immediate view and presence of the court, nor under such circumstances that the court has knowledge of all of the

facts constituting the offense, the court shall order the defendant to appear before it to answer a charge of criminal contempt of court; the trial, if any, upon the charge shall be by the court without a jury; and proof of guilt beyond a reasonable doubt shall be required for conviction.

. . .

"(5) Whenever any person is convicted of criminal contempt of court or sentenced therefor, the particular circumstances of the offense shall be fully set forth in the judgment and in the order or warrant of commitment. In any proceeding for review of the judgment, sentence, or commitment, no presumption of law shall be made in support of the jurisdiction to render the judgment, pronounce the sentence, or order the commitment. A conviction under subsection (3)(a) shall not be subject to review by direct appeal.

"(6) Nothing in this section shall be construed to alter the court's power to punish civil contempt. When the contempt consists of the refusal to perform an act which the contemnor has the power to perform, he may be imprisoned until he has performed it. In such a case the act shall be specified in the warrant of commitment. In any proceeding for review of the judgment or commitment, no presumption of law shall be made in support of the jurisdiction to render the judgment or order the commitment."

SUPREME COURT, U. S.

DEC 9 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-569

WILLIAM S. ELLIS, JR.,

Petitioner,

v.

HAWAII,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR RESPONDENT STATE OF HAWAII IN OPPOSITION

RONALD Y. AMEMIYA
Attorney General
State of Hawaii

Hawaii State Capitol
Honolulu, Hawaii 96813

NELSON S. W. CHANG
Deputy Attorney General

Attorneys for Respondent
State of Hawaii

United States
In the Supreme Court of the

OCTOBER TERM, 1974

No. 74-569

WILLIAM S. ELLIS, JR.,

Petitioner,

v.

HAWAII,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR RESPONDENT STATE OF HAWAII IN OPPOSITION

INDEX

	Page
OPINIONS BELOW	1
QUESTIONS PRESENTED	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENTS	2
CONCLUSION	10

Appendices

A	Judgment of Contempt, June 13, 1974
B	Opinion of the Supreme Court of the State of Hawaii adjudicating Petitioner to be in contempt of Court
C	Opinion of the Supreme Court of the State of Hawaii permanently enjoining Petitioner from the further unauthorized practice of Law (53 Haw. 23, 1971)
D	Relevant statutes
E	Relevant Court Rules

CITATIONS

Cases

	Page
Barner v. State of Louisiana La. 1961, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207	5
Cramp v. Board of Public Instruction of Orange County, Florida Fla. 1961, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285	4
Depew v. Wichita Ass'n. of Credit Men 142 Kan. 403, 49 P.2d 1041 (cert. denied 297 U.S. 710, 1935)	6
Ellis v. Crockett 51 Haw. 45, 451 P.2d 814	4
Heiskell v. Mozie 82 F.2d 861 (D.C.Cir. 1936)	4
Isserman, In re Disbarment of Abraham J. 345 U.S. 286, 97 L.Ed. 1013, 73 S.Ct. 676 (1953)	10
Kearney, Petition of 63 So.2d 630 (1953)	7
Lyon, In re 301 Mass. 30, 16 N.E.2d 74 (1938)	8, 9

Constitutional Provisions and Statutes

United States Supreme Court Rule 19-1(a)	2
28 U.S.C.A. § 1654	3, 4
United States District Court for the District of Hawaii Civil Procedure Rule 1	9
Hawaii Supreme Court Rule 15	9
Hawaii Revised Statutes:	
§ 416-124	4
§ 605-2	4

Respondent State of Hawaii prays that the writ of certiorari to review the Judgment of Contempt entered by the Supreme Court of the State of Hawaii in the case (captioned "In the Matter of the Unauthorized Practice of Law of WILLIAM S. ELLIS, JR., Trustee for the creditors and shareholders of Kula Development Corporation) be denied.

OPINIONS BELOW

The Judgment of Contempt entered by the Supreme Court of the State of Hawaii on June 13, 1974, is reproduced as Appendix A. The opinion of the Supreme Court of the State of Hawaii adjudicating Petitioner to be in contempt of Court has not yet been reported and is reproduced as Appendix B. The opinion of the Supreme Court of the State of Hawaii permanently enjoining Petitioner from the further unauthorized practice of law is reported in 53 Haw. 23 (1971) and is reproduced as Appendix C.

QUESTIONS PRESENTED

1. Can the Supreme Court of the State of Hawaii legally enjoin Petitioner from practicing law in a representative capacity?

2. Can the Supreme Court of the State of Hawaii legally enjoin Petitioner from the unauthorized practice of law in a federal forum, provided that such injunction is not inconsistent with any established rules, orders or practices of the federal courts controlling the practice of law in respect to matters within their jurisdiction?

JURISDICTION

Respondent verily believes that Petitioner has not satisfied the jurisdictional requirements set forth in Rule 19-1(a). of the Rules of the Supreme Court of the United States.

Petitioner has alleged no facts which could be construed to be a federal question of substance nor has Petitioner cited any prior decision of this Honorable Court which is not in accord with the decision of the Supreme Court of the State of Hawaii.

STATUTES INVOLVED

Relevant statutes are set forth in toto in Appendix D of this brief in opposition.

STATEMENT OF THE CASE

Petitioner in his petition makes numerous representations which are clearly unsupported by the record of this proceeding. At all times the record patently indicates that Petitioner was afforded all the rights and privileges of due process of the law. During the contempt proceedings, it was made abundantly clear to Petitioner by the Court that he could appear pro se, because in this proceeding Petitioner was the real party in interest. Petitioner's belief that he could not defend himself pro se in the contempt proceeding stems from his own erroneous assumption, which has as its foundation Petitioner's misinterpretation of the scope and magnitude of the injunctive order. If Petitioner had retained legal counsel as he should have, he would have been fully aware of his rights in the contempt proceedings.

Petitioner's representation that he is being discriminated against by the "Nisei consensus-controlled State courts" is wholly unsubstantiated on the record except for Petitioner's *own* testimony and affidavit.

ARGUMENTS

I

Petitioner, Mr. William S. Ellis, Jr., is not presently, nor has he at any time in the past been, licensed to practice

law in the State of Hawaii or any other jurisdiction. Despite this, Petitioner appeared and argued numerous times before the courts of the State of Hawaii in matters, in which he was *not* deemed to be the real party in interest. Consequently, the Supreme Court of the State of Hawaii in the case of *In the Matter of Unauthorized Practice of Law of William S. Ellis, Jr., Trustee for Creditors and Shareholders of Kula Development Corporation,* by order dated and entered on September 23, 1971, permanently enjoined Petitioner from further engaging in this unauthorized practice of law. The Court in its opinion made it abundantly clear that Petitioner was enjoined from the practice only when he did so in a representative capacity, that is to say when he *was not* the real party in interest

> "In all courts of the United States the *parties* may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." (28 U.S.C.A. § 1654) (Emphasis added)
>
> "No person shall be allowed to practice in any court of record or before a circuit judge at chambers, unless he has been duly licensed so to do by the supreme court; provided, that nothing in this chapter shall prevent any person, plaintiff, defendant, or accused, from appearing in person before any court, or justice, and there prosecuting or defending his own cause, without the aid of legal counsel." (H.R.S. § 605-2)

which enlightened courts define as:

> "We think the words 'the parties,' as used in the statute, mean the parties in interest—the *real*, beneficial owners of the claims asserted in the suit, and by implication that it excludes agents and attorneys in fact and confines the representation, where the party whose rights are actually involved does not appear in person, to attorneys and counselors at law." (*Heiskell v. Mozie*, 82 F.2d 861, 863 (D.C.Cir. 1936) (Emphasis added)
>
> "We deem the interpretation of the counterpart Federal Rules to be highly persuasive upon this court in the

construction of our Rules, . . ." (*Ellis v. Crockett*, 51 Haw. 45, 61, 451 P.2d 814, 824)

Thus, the opinion rendered by Justice Kobayashi can in no way be interpreted as denying Petitioner his right as guaranteed by 28 U.S.C.A. § 1654 to appear pro se in any case where Petitioner is before the Court as the real party in interest.

Justice Kobayashi in his opinion held Petitioner not to be the real party in interest based on his construction of the relevant state law, H.R.S. §§ 416-123 and 124, as reproduced in Appendix D. This Honorable Court has held in a long line of cases that the construction given to a state statute by that state's highest court must be accepted and is not subject to review by the Supreme Court of the United States. (*Cramp v. Board of Public Instruction of Orange County, Florida*, Fla. 1961, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285; *Barner v. State of Louisiana, La.* 1961, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207)

Therefore, Justice Kobayashi's determination as to Petitioner's status must stand and since he is not a real party in interest, he does not come under the protection of 28 U.S.C.A. § 1654 which by case law is restricted to real parties in interest. Thus the injunction entered by the Supreme Court of the State of Hawaii against Petitioner's unauthorized, representative practice of law *was not* unlawful and violated none of Petitioner's civil rights.

II

Petitioner seeks a review by this Honorable Court of a criminal contempt judgment entered by the Supreme Court of the State of Hawaii for violating, by filing legal documents in a representative capacity in the United States District Court for the District of Hawaii, an injunctive order prohibiting his further unauthorized practice of law.

To reiterate (Respondent cannot over-emphasize this point) if Petitioner was unaware of his right to defend the contempt charge pro se, it was only because his lack of legal competence led him to a misinterpretation of the opinion of the Supreme Court of Hawaii. If Petitioner had retained counsel, he would not have assumed away his rights. However, the record clearly indicates that the Supreme Court of the State of Hawaii, while hearing arguments on the contempt proceedings, informed Petitioner that in this proceeding he was the real party in interest and thus could appear pro se. After this information was conveyed to Petitioner, he addressed the Court and argued the merits of the contempt charge. So at no time was Petitioner denied the right to practice law in the State of Hawaii when he was the real party in interest.

In *Depew v. Wichita Ass'n. of Credit Men*, 142 Kan. 403, 49 P.2d 1041, cert. denied 297 U.S. 710 (1935), a trial court had issued an injunction restraining a corporation from bringing collection of account actions in the justice of peace courts and filing petitions in the District Court of the State of Kansas. These acts were considered the practice of law for which the corporation was unauthorized to do. The court, however, believing it had no jurisdiction over such matters, had not included in the injunction the actions of the corporation in bankruptcy cases in the federal courts. The Kansas Supreme Court disagreed with the lower court's reservation and extended the injunctive power of the state court into the federal court.

"We are of the opinion that the trial court did have jurisdiction in the matter of proceedings enumerated as taking place in bankruptcy proceedings in the federal court, and could and should have made an appropriate conclusion which should have been to the effect that such acts on the part of the defendants as enumerated in finding No. 5 were the practice of law and such acts should therefore have been included in the injunction order. . . ." (49 P.2d at 1049)

In the *Petition of Kearney*, 63 So.2d 630 (1953), the petitioner, a licensed practitioner before the United States Supreme Court, the Tax Court of the United States and the United States Treasury Department wanted to practice solely as "a Federal Tax Counsel" limited to appearances only in the federal courts and agencies located in Florida. The Supreme Court of Florida, en banc, held that the practice of law in the federal district courts of Florida was tantamount to the practice of law in that state and required as a prerequisite admission into the local bar. It stated:

"The American Bar Association is committed to like policy and holds, as do many states, that practice before the Tax Court and Treasury Department of the United States may constitute the practice of law which may be enjoined if attempted by one not admitted to practice. . . ." (63 So.2d at 630)

The rationale of the decision was that the practice contemplated by the petitioner was not within the exclusive jurisdiction of the federal courts, but within the rules of procedure and the laws of Florida.

The conception that the practice of law in a federal court is necessarily a practice of law in the state that that court is located was amplified in *In re Lyon*, 301 Mass. 30, 16 N.E.2d 74 (1938). In this case a collection agency unlicensed to practice law in the state frequently represented creditors in bankruptcy proceedings in the federal court. In upholding the state injunction against such practices with modifications, the Supreme Court of Massachusetts said:

". . . The regulation in the public interest of occupations and professions such as those of law, medicine and others which, if uncontrolled, may develop methods and practices inimical to the public welfare, is historically and logically, and we think also legally, a matter primarily of State concern. Practice as an attorney in bankruptcy and other litigation in Federal courts commonly is not confined to acts performed in court or before judicial officers. . . . Ordinarily it involves the maintenance of a place of business and the doing of acts similar to and concurrent with those done in relation to proceedings in State courts. When such practice is carried on by unauthorized persons the resulting evils are the same and reach out into the community in the same way as if the subject matter related to litigation in State courts. It would be almost impossible to separate the practice of law by persons practicing in both jurisdictions into two watertight compartments, and regulation based upon an attempt to do so involving joint or complementary action by each jurisdiction as to each item of conduct would be weak and ineffectual. . . ." (16 N.E.2d at 76)

Hence, in accordance with the holdings of these cases, it can be asserted that the injunction of the Supreme Court of the State of Hawaii upon Petitioner extended to and did enjoin any legal proceedings that he might bring in the Federal Court in Hawaii. When Petitioner subsequently filed the legal papers as trustee pro se in the Federal Court, he violated this injunction and he is in contempt of the court order.

In re Lyon, supra, also stands for the proposition that a state court may restrain the practice of law before federal courts and agencies provided that the person so restrained is not otherwise authorized to engage in such practice by federal rules, statutes or orders. In modifying the injunction to that extent, the court said:

"The discussion on this point starts with the premise that we have neither power nor inclination to interfere in any way with proceedings in Federal courts, or before officers appointed by them. We further concede fully the

Federal power finally to determine who shall practice law before these courts or officers. . .." (16 N.E.2d at 76)

In addition the court said:

". . . We concede that our policy and our statute must yield to any valid rule, order or established practice of the federal courts controlling the practice of law in respect to matters within their jurisdiction. . . . [I]f it be true, as the respondents contend that federal law permits a layman to make a business of representing creditors to some extent in bankruptcy proceedings, we do not undertake to interfere with the exercise of that privilege. . . ." (16 N.E.2d at 77)

There is no incompatibility between rules of the State Supreme Court of Hawaii and that of the United States District Court for the District of Hawaii as to the qualifications of persons who can appear before the Federal Court. The pertinent provision of the State Supreme Court is Rule 15, reproduced in Appendix E, which outlines the residential and academic requirements. The Federal Court precludes the possibility of such incompatibility by incorporating these state requirements through Rule 1 of the Civil Procedure for the United States District Court for the District of Hawaii, reproduced in toto in Appendix E, the pertinent subparagraphs which read, as follows:

"(b) *Eligibility.*

Any attorney licensed to practice in all courts of the State of Hawaii, and in good standing therein, is eligible for admission to the bar of this court.

"(c) *Procedure for Admission. Active and Inactive Members.*

(1) Each applicant for admission to the bar of this court shall file with the clerk a verified petition for such admission stating his full name, his residence address, his office address, the date he was admitted to practice in all courts of the State of Hawaii and that he is in good standing therein. . . ."

"(h) *Discipline and Disbarment.*

* * *

(5) Any person who has not been admitted to the bar of this court, or who has been so admitted but is an inactive member of the bar of this court, or who has been suspended or disbarred therefrom and not reinstated or readmitted to active membership in such bar, and who, without complying with, or in violation of, the requirements of this Rule, exercises in this District any of the privileges of a member of said bar, or pretends to be entitled to do so, is guilty of contempt of court."

The reason for the lack of detailed federal admission requirements substantially different from the state requirements was explained in *In re Disbarment of Abraham J. Isserman*, 345 U.S. 286, 97 L.Ed. 1013, 73 S.Ct. 676 (1953). Chief Justice Vinson stated:

> "This Court (as well as the federal courts in general) does not conduct independent examinations for admission to its bar. To do so would be to duplicate needlessly the machinery established by the states whose function it has traditionally been to determine who shall stand to the bar. Rather our rules provide for eligibility in our bar of those admitted to practice for the past three years before the highest court of any state. The obvious premise of the rule is the confidence which this Court has in the bars maintained by the states of the Union. . . ." (345 U.S. at 287)

The rules of Hawaii's Supreme Court do not prohibit a person from practicing law in a federal court when federal court rules so permit. Collating the admission rules of Hawaii and the federal bars, it stands that if Petitioner is not a member of the Hawaii Bar and ineligible to practice law in Hawaii's courts, he cannot practice law either in the United States District Court for the District of Hawaii or the United States Court of Appeals for the Ninth Circuit.

CONCLUSION

For the foregoing reasons, Respondent State of Hawaii respectfully requests this Honorable Court to deny certiorari to Petitioner.

Respectfully submitted,

RONALD Y. AMEMIYA
Attorney General
State of Hawaii

NELSON S. W. CHANG
Deputy Attorney General
State of Hawaii

Attorneys for Respondent
State of Hawaii

December 6, 1974

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Brief in Opposition were served upon WILLIAM S. ELLIS, JR., 12 N. King Street, Room 17, Honolulu, Hawaii 96817, Petitioner Pro Se, by mailing the same to him, postage prepaid, on December 4, 1974.

NELSON S. W. CHANG
Deputy Attorney General
State of Hawaii

Attorney for Respondent
State of Hawaii

Appendix A

No. 5044.

IN THE SUPREME COURT OF THE STATE OF HAWAII.

OCTOBER TERM 1973.

In the Matter of the Unauthorized Practice of Law of WILLIAM S. ELLIS, JR., trustee for the creditors and shareholders of Kula Development Corporation.

JUDGMENT OF CONTEMPT

Of Counsel:

CADES SCHUTTE FLEMING & WRIGHT

EDWARD A. JAFFE (1027-0)
165 South King Street
Honolulu, Hawaii 96813
(Box 939, Honolulu 96808)

No. 5044.

IN THE SUPREME COURT OF THE STATE OF HAWAII.

OCTOBER TERM 1973.

In the Matter of the Unauthorized Practice of Law of WILLIAM S. ELLIS, JR., trustee for the creditors and shareholders of Kula Development Corporation.

JUDGMENT OF CONTEMPT.

In accordance with this Court's opinion filed May 3, 1974 in which it was adjudged that Mr. William E. Ellis, Jr. stands in contempt of this Court;

IT IS HEREBY ORDERED that Mr. William S. Ellis, Jr. pay a fine of $250.00 to the Chief Clerk of this Court on or before June 10, 1974.

DATED: Honolulu, Hawaii, this 13 day of June, 1974.

(Signed) WILLIAM A. RICHARDSON
Chief Justice

Appendix B

IN THE SUPREME COURT OF THE STATE OF HAWAII.

OCTOBER TERM 1973.

In the Matter of the Unauthorized Practice of Law of MR. WILLIAM S. ELLIS, JR., Trustee for the Creditors and Shareholders of Kula Development Corporation.

NO. 5044.

MOTION FOR ORDER TO SHOW CAUSE.

MAY 3, 1974.

RICHARDSON, C.J., LEVINSON, KOBAYASHI AND OGATA, JJ., AND CIRCUIT JUDGE VITOUSEK ASSIGNED TEMPORARILY BY REASON OF VACANCY.

INJUNCTIONS—*unauthorized practice of law—definition.*

A final judgment of a state's highest court permanently enjoining a person from engaging further in the unauthorized practice of law is not impliedly limited in applicability to the state court system, but also clearly enjoins such person from the practice of law in a federal court of such state.

SAME—*same—authority of a state's highest court.*

A state's highest court has the authority to enjoin a person's unauthorized practice of law in a federal forum within that state, so long as there are no rules, orders, or practices of the relevant federal court that would conflict with the terms of such injunction.

SAME—*same—enforceability.*

Proper action taken by the highest court of a state to punish for violation of the terms of an injunction forbidding the unauthorized practice of law in a federal forum is not inconsistent with any exclusive jurisdiction vested in a federal forum, so long as there are no rules, orders, or practices of the relevant federal court that would conflict with the terms of such injunction.

Per Curiam. As one of the very few and unique exceptions to the general rule that one not licensed to practice law before this Court is absolutely forbidden to engage in legal practice within this State, we held in *In Re Ellis*, 53 Haw. 23, 31, 487 P.2d 286, 291 (1971), *cert. den.*, 405 U.S. 1075 (1972), that Mr. William S. Ellis, Jr., as trustee for the creditors and stockholders of Kula Development Corporation, a dissolved Hawaii corporation, might continue to render services of a legal nature to the dissolved corporation, providing that a determination of imperative financial necessity therefor be subsequently made by a master to be appointed pursuant to an order of this Court.

The key subsequent events relevant to, and following, our decision in *In Re Ellis, supra*, are noted chronologically, *infra*. As all events pertinent herein are matters of record and, as there is, and can be, no disputation made as to the facts stated with reference to these events, we think it eminently proper to take judicial notice thereof.

(a) In an order filed August 10, 1971, pursuant to our opinion in *In Re Ellis, supra*, Mr. Ellis was enjoined from engaging further in the unauthorized practice of law, except as should be necessarily incident to an appearance (as trustee for the creditors and shareholders of the dissolved Kula Development Corporation) before a master to be designated by the assignment judge of the circuit court, first circuit.

(b) The Hon. Masato Doi, a judge of the circuit court, first circuit, having been designated as master on August 12, 1971, the matter of the financial status of Kula Development Corporation came on for initial hearing September 9, 1971. Mr. Ellis declined to appear before Judge Doi in a letter to Judge Doi, received September 9, and Judge Doi subsequently filed a notice with this Court that, in light of the knowing refusal of Mr. Ellis to appear in his capacity as sole trustee for the creditors and shareholders of Kula Development

Corporation, he (Judge Doi) was unable to make an intelligent assessment of the corporation's financial condition.

(c) Subsequent to, and because of, the above noted events, Mr. Ellis, as such trustee, was permanently enjoined from engaging further in the unauthorized practice of law, by final judgment of this Court, filed September 23, 1971.

(d) Beginning in April, 1973, and extending at least through May 17, 1973, Mr. Ellis, as such trustee, filed in the United States District Court for the District of Hawaii, numerous papers, signed by him, including but not limited to, various petitions, requests for service, complaints, claims, joinder in pleadings and cross-claim, appearances, objections to motions, suggestion of recusal, motions to disqualify opposing counsel, other and novel forms of legal pleading—together with legal memoranda and appendices thereto. We conclude that these papers were prepared by Mr. Ellis himself.

(e) On February 6, 1974, pursuant to a motion filed therefor, this Court issued to William S. Ellis, Jr., respondent, an order to show cause why he should not be held in contempt of court for violation of the injunction embodied in this court's final judgment of September 23, 1971, *supra* (c), in the particulars summarized, *supra* (d), and detailed in an 85 page affidavit in support of the motion for such order to show cause, service of which motion and affidavit on Mr. Ellis having been made December 26, 1973.

(f) Subsequently, at our request, an *amicus curiae* brief was filed by the State Attorney General, a counter-affidavit in opposition to the charge of contempt was filed by respondent Ellis, and other supplemental and answering memoranda were filed with this Court. The counter-affidavit of respondent Ellis admits and does not dispute any of the matters of record in the federal court, *supra* (d), detailed in the affidavit filed in support of the motion for an order to show

cause. This matter was argued before us, March 12, 1974, the designated return date for the order to show cause.

There can be, and is, no doubt that Mr. Ellis has openly and continually ignored the order of this Court, dated September 23, 1971, enjoining him from the further unauthorized practice of law. We further observe, based upon the record and the circumstances of this case, as well as of the other cases in this Court in which Mr. Ellis has appeared *pro se*,[1] that the violations of this Court's final judgment of September 23, 1971, were not innocent, but rather that respondent Ellis intentionally, knowingly, and wilfully flouted the terms of said final judgment.

Said final judgment was absolute and unambiguous in its terms and provided clearly as follows:

> IT IS HEREBY ORDERED AND ADJUDGED that William S. Ellis, Jr., trustee for the creditors and stockholders of Kula Development Corporation, is permanently enjoined from engaging further in the unauthorized practice of law.

The order is neither expressly nor impliedly limited in applicability to the state court system only. There is, and can be, no colorable argument made that the order is so limited by its actual terms. Furthermore, there can be no doubt that the "practice of law" engaged in by Mr. Ellis in the federal district court of this State is legally tantamount to the practice of law within this State and is thus covered by the orders and rules of the state's highest court regarding the practice of law, *Petition of Kearney*, 63 So. 2d 630 (Fla. 1953). Therefore, said "practice of law" is controlled by the injunctive order embodied in our final judgment of September 23, 1971, and Mr. Ellis is in violation thereof.

---

1 *See, Haruda v. Burns*, 50 Haw. 528, 445 P.2d 564 (1968), *cert. den.*, 393 U.S. 1106 (1969); *Ellis v. Crockett*, 51 Haw. 45, 451 P.2d 814 (1969); *MDG Supply v. Diversified Investment*, 51 Haw. 375, 463 P.2d 525 (1969), *cert. den.*, 400 U.S. 868 (1970); *MDG Supply v. Ellis*, 51 Haw. 480, 463 P.2d 530 (1969); *MDG Supply v. Calmes*, 52 Haw. 154, 472 P.2d 199 (1970).

The only remaining questions then are (1) whether this Court, the highest court of the state of Hawaii, has the authority to enjoin a person's unauthorized practice of law in a federal forum, and then (2) whether action taken by this Court, the highest court of the state of Hawaii, to punish for violation of such an injunction is proper as not inconsistent with any exclusive jurisdiction vested in the federal district court. The answers to both of these legal questions are in the affirmative. *In Re Lyon*, 301 Mass. 30, 16 N.E.2d 74 (1938). That case, which we find very persuasive, clearly held that the highest judicial court of a state has jurisdiction to control the unauthorized practice of law in a federal forum.

> The regulation in the public interest of occupations and professions such as those of law, medicine and others which, if uncontrolled, may develop methods and practices inimical to the public welfare, is historically and logically, and we think also legally, a matter primarily of State concern. . . . When such practice is carried on by unauthorized persons the resulting evils are the same and reach out into the community in the same way as if the subject matter related to litigation in State courts. It would be almost impossible to separate the practice of law by persons practising in both jurisdictions into two watertight compartments and regulation based upon an attempt to do so involving joint or complementary action by each jurisdiction as to each item of conduct would be weak and ineffectual. 301 Mass. at 34-35, 16 N.E.2d at 76.

With regard to the second issue, as to whether the highest state court could enforce a law forbidding practice of law by unauthorized, unlicensed persons, *In Re Lyon*, *supra*, held that it could.

> [W]e see no reason why our policy or statute should give way in favor of persons who seek to escape State regulation of the practice of law on the ground that their practice is within the field of Federal jurisdiction, when they are not authorized to practise in that jurisdiction. Within these limits enforcement of our act according to its terms does not interfere with any Federal function. 301 Mass. at 35-36, 16 N.E.2d at 77.

The *Lyon* court further noted that, lacking, as do we, any inclination to interfere with federal court proceedings, it would, of necessity, yield to "any valid rule, order or established practice of the federal courts controlling the practice of law in respect to matters within their jurisdiction." 301 Mass. at 35, 16 N.E. 2d at 77. Here, there are no such conflicting rules, conflicting orders, or conflicting federal court practices. There can be no such conflict for the reason that the United States District Court for the District of Hawaii by its own rules depends on this Court to determine who may or may not practice law before it.[2]

For his violation of the injunctive order in the final judgment of this Court, filed September 23, 1971, *supra* (c) in the manner set forth in summary form, *supra* (d), which is a violation of S.L.H. 1972, Act 9, § 1, sec. 1077 (1) (g), this Court, electing to proceed under S.L.H. 1972, Act 9, § 1 sec. 1077(3) (b), and all pertinent facts herein being undisputed as matters of court record, and susceptible of judicial notice, and no provision of HRS ch. 605 requiring otherwise by virtue of HRS § 605-16,

IT IS HEREBY ADJUDGED that Mr. William S. Ellis, Jr., stands in contempt of this Court, and,

IT IS HEREBY ORDERED that Mr. William S. Ellis, Jr., pay a fine of $250 to the Chief Clerk of this Court on or before June 10, 1974.

EDWARD A. JAFFE
(Cades, Schutte, Fleming
& Wright of counsel)
for the motion.

---

[2] Rule 1 of the *Rules for the United States District Court for the District of Hawaii* provides in essence that, with the exception of instances not here relevant, only those who are permitted to practice in the state court system may practice in the federal district court. It is evident, then, that Mr. Ellis's practice of law before the federal district court was improper under the final judgment of this Court enjoining him from the further unauthorized practice of law. Rule 1(b), *Rules for the United States District Court for the District of Hawaii.*

WILLIAM S. ELLIS, JR.,
pro se, contra.

NELSON S. W. CHANG,
Deputy Attorney General,
for State of Hawaii, *amicus curiae*.

(Signed) WILLIAM R. RICHARDSON
BERNARD H. LEVINSON
BERT T. KOBAYASHI
THOMAS S. OGATA
BETTY M. VITOUSEK

Appendix C

IN THE SUPREME COURT OF THE STATE OF HAWAII.

OCTOBER TERM 1970

In the Matter of the Unauthorized Practice of Law of Mr. William S. Ellis, Jr., trustee for the creditors and shareholders of Kula Development Corporation.

ORIGINAL PROCEEDING.

OPINION OF THE COURT.

IN THE SUPREME COURT OF THE STATE OF HAWAII.

OCTOBER TERM 1970

IN THE MATTER OF THE UNAUTHORIZED PRACTICE OF LAW OF MR. WILLIAM S. ELLIS, JR., TRUSTEE FOR THE CREDITORS AND SHAREHOLDERS OF KULA DEVELOPMENT CORPORATION.

No. 5044.

MOTION FOR PERMANENT INJUNCTION.

JUNE 25, 1971.

RICHARDSON, C.J., MARUMOTO, ABE, LEVINSON AND KOBAYASHI, JJ.

CORPORATIONS—*dissolution and forfeiture of franchise—actions by or against corporation after dissolution—statutory liquidators.*

The former directors as statutory liquidators are proper and necessary parties to legal proceedings aimed at winding up the affairs of a dissolved corporation. HRS § 416-124.

SAME—*same—effect of dissolution on corporate property—HRS § 416-124.*

The word "title" in HRS § 416-124 is loosely used for the property of a dissolved corporation actually belongs to those persons who were stockholders at the time of its dissolution, the right to possession passing to the former directors by force of the statutory provision making them statutory liquidators to settle the corporate affairs.

ATTORNEY AND CLIENT—*retainer and authority—rights of litigants to act in person—HRS § 605-2.*

HRS § 605-2 permits a person to represent himself pro se in the courts of this state if that person by the substantive law has the right sought to be enforced, or put differently, is the real party in interest.

CORPORATIONS—*dissolution and forfeiture of franchise—actions by or against corporation after dissolution—real parties in interest.*

Stockholders of a dissolved corporation are the real parties in interest upon claims in favor of or against the corporation at the time of dissolution, their interests subject to the liens of creditors.

CORPORATIONS—*dissolution and forfeiture of franchise—statutory liquidator—rights and duties.*

ATTORNEY AND CLIENT—*retainer and authority—rights of litigants to act in person.*

The function of a statutory liquidator of a dissolved corporation (HRS § 416-124) does not include the right to present argument pro se because in this capacity he is representing the interest of others and is engaged, therefore, in the unauthorized practice of law.

CONSTITUTIONAL LAW—*due process of law—deprivation of property—actions by or against a dissolved corporation.*

Due process requires that in judicial proceedings winding up the affairs of a dissolved corporation, a stockholder or creditor may not be deprived of his property without his "day in court."

ATTORNEY AND CLIENT—*unauthorized practice of law—unique exception.*

Where a statutory liquidator, not an attorney in this state, makes a showing that the assets of a dissolved corporation are insufficient to hire an attorney for purposes of judicial proceedings aimed at winding up corporate affairs, public policy and constitutional guarantees dictate that in this limited situation this court make a unique exception to our prohibition against one engaging in the unauthorized practice of law, and that he be allowed to perform the necessary legal services.

This is an original action[1] brought before this court by James S. Campbell, attorney, seeking a permanent injunction to enjoin the alleged unauthorized practice of law by William S. Ellis, Jr., as trustee for the creditors and stockholders of Kula Development Corporation, a dissolved Hawaiian corporation.

At the time of corporate dissolution Mr. Ellis was both a stockholder and a director. By operation of law[2] he and other directors became trustees for the creditors and stockholders. The records at the State Department of Regulatory Agencies show that thereafter all of Mr. Ellis' co-trustees resigned leaving him as sole trustee.

Mr. Campbell represents one of several creditors of the dissolved corporation. In a First Circuit Court case between his clients as plaintiffs against Kula Development Corporation, et al., as defendants, Mr. Campbell complains that Mr. Ellis practiced law without authority.

Mr. Ellis is not licensed to practice law in this or any other jurisdiction. It is undisputed, however, that in exercising his power as trustee and fulfilling this responsibility, Mr. Ellis has engaged in the practice of law. HRS § 416-124 provides as follows:

"*Trustee; powers, liabilities, duties.* The title to all assets and property, real, personal, and mixed, belonging to the

---

[1] This court has inherent power to regulate matters before it regarding the practice of law.
Hawaii Constitution art. V, § 1 provides in part:
"The judicial power of the State shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish."
Rules of the Supreme Court, State of Hawaii (1968):
"16(d): *Limitations.* The jurisdiction of this court and the other courts of the State of Hawaii to grant appropriate relief in causes involving unprofessional conduct or unauthorized practice of law shall not be deemed to be limited, restricted or abrogated by anything contained in this rule."
See In re Integration of the Bar, 50 Haw. 107, 432 P.2d 887 (1967).

[2] HRS § 416-123.

corporation shall, immediately upon the dissolution thereof, * * * vest in the trustee or trustees for the creditors and stockholders or members of the corporation dissolved.

"Under the name of the trustee or trustees * * * the trustee or trustees shall have power: to sue for and collect the debts, claims, and demands due to the corporation, or compound and settle any claims as they may deem best; to have, hold, reserve, sell, and dispose of property, real, personal, and mixed; to adjust and pay all debts of the corporation dissolved; * * * to exercise all powers of the dissolved corporation; * * * to divide among the stockholders * * * moneys and other properties that remain after paying the debts and necessary expenses; and they shall be jointly and severally liable to the creditors and to the stockholders * * * to the extent of the corporation property which shall come into their hands. * * *"

Mr. Ellis claims that because of lack of funds in the dissolved corporation, he, as trustee, cannot pay for the services of an attorney and thus is compelled to do all the necessary legal work.

The novel question for us to resolve is whether Mr. Ellis as said trustee, in his pro se practice of law, represents himself as trustee or is, in effect, actually representing the interest of another person and thus is guilty of unauthorized practice of law.

I. THE TRUSTEESHIP OF MR. ELLIS.

At common law, in the absence of statute, when a corporation was effectively dissolved its existence as a legal entity ceased. Dissolution terminated its power to sue or be sued in its corporate name, and extinguished all debts due to or from it.[3]

[3] State v. Libby, 238 Mo. App. 36, 42, 175 S.W.2d 171, 173-74 (1943). *Note, Suits by and Against Dissolved Corporations*, 48 Iowa L. Rev. 1006, 1007 (1963).

To abrogate this rule of the common law, statutes have been enacted in all jurisdictions pertaining to this subject of litigation by and against a dissolved corporation.[4] These statutes take various forms but all are remedial in purpose, removing the common law incapacity of a dissolved corporation to sue or be sued.

Some statutes extend the life of the corporation permitting it to serve as a named party litigant.[5] Others, such as ours here in Hawaii, HRS § 416-123, treat the existence of the corporation as terminated upon dissolution but nonetheless allow suits to be brought or continued. These statutes resulted from a demand by stockholders and creditors for equitable relief and embodied the "trust fund theory" by authorizing the directors at the time of dissolution to serve as trustees.[6] In this capacity the former directors are proper and necessary parties to legal proceedings aimed at winding up the affairs of the dissolved corporation. *State* v. *Libby*, *supra* at 43.

Although captioned "trustee" by these statutes, a more accurate characterization for a former director is that of "statutory liquidator."[7] His function is simply to liquidate the assets possessed as expeditiously as sound business judgment permits.[8] To this end the equally amorphous word "title" is found in HRS § 416-124, *supra*, and in similar statutes.

The word "title" in this context is loosely used. The prop-

---

[4] W. Fletcher, 16A Cyclopedia of Corporations § 8143, p. 316 (perm. ed. rev. vol. 1962).

[5] *Id.*

[6] *Id.* at 322-23. *Note, Suits by and Against Dissolved Corporations*, *supra* at 1010.

[7] United States v. Krueger, 121 F.2d 842, 844 (3rd Cir. 1941).

See also Rossi v. Caire, 186 Cal. 544, 199 P.2d 1042 (1921) applying the phrase "trustees in liquidation" at 549.

For criticism of the term "trust" *see* IV Pomeroy, Equity Jurisprudence § 1046 at p. 98 (5th ed. 1941), where in reference thereto the author states "* * * [it] can only be called so by way of analogy and metaphor."

[8] *See* 16A Fletcher, *supra*, § 8178, p. 415.

erty of a dissolved corporation actually *belongs* to those persons who were stockholders at the time of its dissolution, but the right to possession passes to the former directors by force of the statutory provision making them statutory liquidators to settle the corporate affairs. *Jones* v. *Peck*, 63 Cal. App. 397, 401-02, 218 P. 1030, 1032 (1923).[9] In substance therefore, Mr. Ellis as statutory liquidator possesses the property of the former stockholders of the Kula Development Corporation with the power to dispose of so much thereof as is necessary to pay creditors who have alien upon it for their own security.[10]

II. THE RIGHT OF ONE TO REPRESENT HIMSELF.

Mr. Ellis in appearing pro se claims a right to do so under HRS § 605-2 which in part provides:

> "[N]othing in this chapter shall prevent any person, plaintiff, defendant, or accused, from appearing in person before any court, or justice, and there prosecuting or defending *his own cause*, without the aid of legal counsel." (Emphasis added)

Our statute's import mirrors that of an early federal law.[11] While authoritative analysis of HRS § 605-2 is lacking, in matters relating to the conduct of business before our courts the construction of a counterpart federal provision is highly persuasive. *Ellis* v. *Crockett*, 51 Haw. 45, 61, 451 P.2d 814, 824 (1969). We find, therefore, federal pronouncements on 28 U.S.C.A. § 1654, *supra* n.11, helpful in construing the right asserted.

---

[9] *Id.* at 420.

[10] *Id.*

See Rossi v. Caire, *supra* at 552-53, where in discussing the subject of "title" the court states that "* * * [assuming] legal title to the property had solely vested in the trustees designated by the statute, * * * [s]ubject to * * * the payment of creditors, the former stockholders were the sole beneficiaries and the absolute owners in equity of the property."

[11] Judiciary Act of 1789, § 35, 1 Stat. 73, 92 (1789) provided that "in all the courts of the United States, the parties may plead and manage their own causes personally * * *."

This identical language is now found in 28 U.S.C.A. § 1654 (1966).

Clearly by statute or otherwise this right of self-representation is available to a person in a civil proceeding.[12] But regardless of the right's derivation or the proceeding where it is invoked, the question is whether one seeking to represent himself pro se is a person who by the substantive law has the right sought to be enforced. Put differently, is Mr. Ellis, in conducting the litigation, the real party in interest? *Heiskell v. Mozie*, 82 F.2d 861, 863 (D.C. Cir. 1936). We think not.

As indicated by the foregoing discussion (Part I), after dissolution, the stockholders of the Kula Development Corporation were the real parties in interest upon all claims in favor of or against this corporation at the time of dissolution. *Clark Estate Co. v. Gentry*, 362 Mo. 80, 91, 240 S.W.2d 124, 130 (1951). Their interests, in turn, were subject to the liens of creditors.

On the other hand, in legal proceedings aimed at winding up the former corporation's affairs, the interest of Mr. Ellis as trustee is remedial in nature and promised upon procedural necessity. *State v. Libby, supra.* The paucity of precedent notwithstanding, as Mr. Ellis' status of "trustee" is intended to insure nothing more than the orderly administration of assets, he may not claim his statutory function includes the right to present argument pro se in the courts of this state. In this capacity he is representing the interests of others, and in judicial proceedings it is our opinion that he is engaged in the unauthorized practice of law.

---

[12] Price v. Johnson, 159 F.2d 234 (9th Cir. 1947), *cert. granted* 331 U.S. 804 (1947).

Apart from statute the right is rooted in the common law. *See* following federal and state civil cases: Osborn v. United States, 22 U.S. (9 Wheat.) 738, 829 (1824); Hightower v. Hawthorn, 12 F. Cas. 142 (No. 6,780) (Sup. Ct. Ark. 1826); Arthaud v. Griffin, 202 Ia. 462, 464, 210 N.W. 540, 541 (1926); Americus v. McGinnis, 128 Wash. 28, 30, 221 P. 987, 988 (1924).

In the criminal context authorities are divided whether this right is constitutional as well as statutory. Dearinger v. United States, 344 F.2d 309 (9th Cir. 1965) at 311, n.2.

But whether constitutional or statutory, the right is not absolute and may be qualified under certain circumstances (criminal proceeding). United States v. Davis, 260 F. Supp. 1009, 1019 (E.D. Tenn. 1966).

III. STOCKHOLDERS AND CREDITORS ENTITLED TO PROCEDURAL DUE PROCESS.

The anomaly of this situation gives rise to a constitutional infirmity wherein a stockholder's or creditor's property is subject to deprivation without him having his "day in court."[13] Basic requisites of "due process" guarantee that where property rights may be affected, notice and an opportunity to be heard must be afforded to all interested persons. *Mortensen* v. *Emp. Ret. Syst. Trustees*, 52 Haw. 212, 219-21, 473 P.2d 866, 871-72 (1970); *Territory* v. *Jennie L. Aona et al.*, 43 Haw. 253, 255 (1959). How then are these rights to be protected?[14]

Because of the constitutional dilemma presented, public policy dictates that an exception be made at this time to the prohibition against one engaging in the unauthorized practice of law.[15] In the limited situation where the statutory liquidator makes a showing that corporate funds are unavailable for the hiring of counsel, he may perform the necessary legal services.

---

[13] Weinacht v. Bower, 140 Ore. 527, 533, 14 P.2d 622, 625 (1932).

[14] Neither party briefed or argued the issue whether under the facts at hand "a stockholder" in this capacity could appear pro se in his own behalf as well as the representative of other stockholders. At this juncture we do not reach this issue.

In a derivative aciton a stockholder was permitted to appear pro se. Wilhelm v. Murchison, 206 F. Supp. 733 (S.D.N.Y. 1962), *appeal dismissed*, 312 F.2d 389 (2nd Cir. 1964); discussed in 17 Rutgers L. Rev 651 (1963).

Under a similar statutory scheme, the right to assert or defend claims vests by law *exclusively* in the "statutory liquidators" of a dissolved corporation. Clark Estate Co. v. Gentry, *supra* at 86-87.

However a statutory liquidator may be personally liable to a stockholder or creditor for breach of his duty to act with reasonable care and prudence in settling the corporate affairs. McClean v. Bradley, 282 F. 1011 (N.D. Ohio 1922), *aff'd* 289 F.2d 379 (6th Cir. 1924), *cert. denied*, 266 U.S. 619 (1924); King v. Coosa Valley Mineral Products Co., 283 Ala. 197, 215 So. 2d 275 (1968); Mengel Co. v. Pierson, 99 N.J. Eq. 436, 132 A. 78 (1926).

See HRS § 416-125 providing for an accounting action by stockholders or creditors.

[15] Hawaii Const. art. V, § 6 provides:

"The Supreme Court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure, and appeals, which shall have the force and effect of law."

IV. CONCLUSION.

Again reiterating, the cornerstone upon which we provide this exception is the claim of insufficient assets. Mr. Ellis asserts that assets are insufficient. Some light is shed on this assertion in a trial statement by Mr. Ellis that he lacks "liquid assets." These terms, however, depending on the circumstances, may be far from synonomous in application. Although an inventory of property has not been provided to this court, it is our understanding that real estate comprises a substantial portion of, if not the total, value of the assets of the former corporation.

In order to determine the current worth of all property involved, we shall appoint under separate order a circuit judge of the first circuit as master to hold an evidentiary hearing on this matter. Should sufficient assets in some form be available to retain an attorney, Mr. Ellis will be directed to do so.[16] If not, to insure those with property rights of their day in court Mr. Ellis, as trustee, will be allowed to continue pro se in his practice of law.

An order will so issue.

JAMES S. CAMPBELL (CADES, SCHUTTE, FLEMLNG & WRIGHT of counsel) for the motion.

WILLIAM S. ELLIS, JR., pro se contra.

(Signed) WILLIAM R. RICHARDSON
MASAJI MARUMOTO
BERNARD H. LEVINSON
BERT T. KOBAYASHI

[16] A statutory trustee may always employ agents to aid him in the performance of his duties should these services be necessary for purposes of winding up the affairs of the corporation. *See* 16A Fletcher, *supra*, § 8179, p. 421 at 422-23.

CONCURRING OPINION OF ABE, J.

I agree with the majority of this court on points I and II and the conclusion that Mr. Ellis "is engaged in the unauthorized practice of law."

The due process issue discussed in point III of the court's decision was not before us because Mr. Ellis did not raise that issue. Therefore, I believe that it is a mistake for this court not only to raise but also to decide the issue sua sponte, especially without any briefing or argument on the question.

KAZUHISA ABE

Appendix D

§416-123 *Proceedings after dissolution; appointment of trustees.* Upon the voluntary dissolution of any corporation, the director of regulatory agencies shall appoint a trustee or trustees with full powers to settle the affairs of the corporation, unless the certificate filed pursuant to section 416-121 states that the corporation has not engaged in any business since incorporation, that no debts of the corporation remain unpaid or undischarged, and that all amounts, if any, paid in on subscriptions, less any amounts disbursed for necessary expenses, have been returned to the subscribers.

Upon the involuntary dissolution of any corporation and unless and until some other person or persons are appointed by the director of regulatory agencies or a court of competent jurisdiction, the directors of any corporation organized for profit, or directors or managers of any nonprofit corporation by whatever name the managers may be called, shall be and act as trustees for the creditors and stockholders or members of the corporation with full powers to settle its affairs; provided, that upon or at any time after the involuntary dissolution of any corporation, the director of regulatory agencies may, whether or not the directors or managers of the corporation shall have undertaken to act as trustees in dissolution, appoint a trustee or trustees for the creditors and stockholders or members of the corporation with the powers to settle its affairs. [CC 1859, §1440; am L 1909, c 135, §1; RL 1925, §3372; RL 1935, §6756; am L 1935, c 158, §2; am L 1937, c 93, §2; am L 1939, c 95, §3; RL 1945, §8354; RL 1955, §172-132; am L 1959, c 203, §14; am L Sp 1959 2d, c 1, §15; am L 1963, c 114, §3; am L 1965, c 111, §2]

§416-124—Trustee; powers, liabilities, duties. The title to all assets and property, real, personal, and mixed, belonging to the corporation shall, immediately upon the dissolution thereof, unless by decree of court of competent jurisdiction it is otherwise ordered, vest in the trustee or trustees for the

creditors and stockholders or members of the corporation dissolved.

Under the name of the trustee or trustees of the corporation dissolved (or under the name of the survivors of the trustees), unless and until some other person or persons are appointed by some court of competent jurisdiction, the trustee or trustees shall have power: to sue for and collect the debts, claims, and demands due to the corporation, or compound and settle any claims as they may deem best; to have, hold, reserve, sell, and dispose of property, real, personal, and mixed; to adjust and pay all debts of the corporation dissolved; to proceed as speedily as practical to a complete winding up of the corporation and, to that end, to exercise all powers of the dissolved corporation; to file bills for instructions in any court of competent jurisdiction on any matters concerning the administration of the assets under their control; to divided among the stockholders (or members if under the charter of the corporation they are entitled thereto) moneys and other properties that remain after paying the debts and necessary expenses; and they shall be jointly and severally liable to the creditors and to the stockholders or members if under the charter of the corporation the members are entitled to a distribution of the remaining property of the corporation to the extent of the corporation property which shall come into their hands.

The corporation may enter into a contract or agreement with any person or persons who are requested by the corporation to act as trustee or trustees, covering the administration of the assets and properties of the corporation, and if such persons are appointed trustees as herein provided, the contract shall in all respects be effective and shall be binding upon the corporation to the full amount of the assets coming into the hands of the trustees, provided that no contract shall prejudice the rights secured by law to the creditors of the corporation. [L 1939, c 95, §4; RL 1945, §8355; RL 1955, §172-133; am L 1959, c 203, §15]

Appendix E

RULES OF HAWAII SUPREME COURT
RULE 15. ADMISSION TO THE BAR.

(a) Applications. Every applicant for admission to the bar shall file with the clerk a verified typewritten application in duplicate, setting forth his name and age, that he is a citizen of the United States of America and bears no allegiance or fidelity to any foreign state or sovereign, his last place of residence, the character and term of his study, from what institution of law he has been graduated and with what degree. He shall state the names of all courts to which he has made applications to practice, the dates he has made applications to practice, the dates he has taken examinations and the dates he has been admitted to practice. He shall state whether he has been the subject of any investigation or proceeding for professional misconduct or whether he has ever been rejected upon an application to practice before any court. The application shall be accompanied by the recommendation of at least two attorneys of this court and by such other relevant documents or information as may be called for by the court or by the board of examiners. The recommendations shall set forth the length of time, when, and under what circumstances they have known the applicant, and their appraisal of the applicant's moral character. Unless otherwise ordered, applications shall be filed at least 60 days prior to the date of examination. The statements contained therein shall be investigated by the board of examiners, who shall report the results of their investigation to the court, together with their recommendations thereon. Prior to any admission, the court shall be satisfied of the good moral character of the applicant.

(b) Education Requirements. No applicant who is not a graduate of a law school approved by the Council of the American Bar Association on Legal Education and Admis-

sions to the Bar, shall be admitted to practice in this court; provided that an attorney admitted to practice before the highest court of one or more states, territories or the District of Columbia, who is not a graduate of a law school so approved but who has actively practiced law in such states, territories or the District of Columbia for 5 of the 6 years immediately prior to his application, shall be eligible for examination and admission. Service as a judge of a court of record shall be considered the equivalent of active practice of law within the meaning of these rules. Any attorney, whether an American citizen or not, may be permitted to associate himself with a member or members of the local bar in the presentation of a specific case at the discretion of the presiding judge or judges.

(c) Residence Requirements. In order to enable the board of examiners to have sufficient time and opportunity to investigate the applicant's moral character as required by this rule, no person shall be admitted unless he is and will have been continuously an actual and bona fide resident of the State of Hawaii for three months immediately prior to being admitted and shall have been physically present within the State of Hawaii for at least 75% of the said three month period.